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In The

Supreme Court of the United States

October Term, 1976

No. 76-1510

RAYMOND W. GRABER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Raymond W. Graber, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit filed March 31, 1977, under Docket No. 77-1006.

OPINION BELOW

The Court of Appeals rendered no opinion. The opinion of the District Court convicting petitioner of violation of 18 U.S.C. §1623 was dated October 4, 1976, is unreported, and is attached as Appendix A. The oral opinion of the District Court denying petitioner's motion for a new trial is attached as Appendix B.

JURISDICTION

The judgment whose review is sought is final and is attached as Appendix C. No rehearing in the Court of Appeals was requested. The jurisdiction of the Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Which of the conflicting standards imposed by the various courts of appeals shall be applied in determining effective assistance of counsel claims under the Sixth Amendment?

2. Whether, when trial counsel writes to the court to advise that "it is patent" that a conflict of interest is "a real possibility," the court has a duty to advise the client of his lawyer's statement and to require him to obtain new counsel?

3. Whether, after receiving information strongly suggesting that trial counsel has failed to prepare his case and has falsely represented that his client intended to flee the processes of the court (the result of the latter being the arrest of the client on a warrant), the court has a duty to inquire into and examine the relationship between the client and his attorney in order to preserve the defendant's Sixth Amendment right to effective assistance of counsel?

4. Whether defense counsel's remarks to the trier of the fact, which were demeaning and derogatory about his client, attacked his credibility as to material evidence he was about to give in his own defense, and were made in the client's absence or out of his hearing at sidebar, violated due process and the petitioner's rights to enjoy a public trial, to be confronted with witnesses against him, to participate in his trial, and to have the assistance of counsel for his defense?

5. Whether, when the trial of the action was adjourned because of the petitioner's disability, the petitioner was heavily medicated, and his condition necessitated an examination under 18 U.S.C. §4244, it was appropriate for the court to accept a jury trial waiver and proceed to trial, without placing in the record the results of the Section 4244 examination previously ordered, or otherwise inquiring as to petitioner's competency to waive a jury.

6. Whether petitioner's full and discursive description of his participation in a political fund-raising process constituted perjury within the meaning of *Bronston v. United States*, 409 U.S. 352 (1973).

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment, United States Constitution

> "No person . . . shall . . . be deprived of life, liberty or property without due process of law."

Sixth Amendment, United States Constitution

> "In all criminal prosecutions the accused shall enjoy the right to a . . . public trial . . . ; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

STATEMENT OF THE CASE

A federal grand jury investigating allegations of political corruption in the Nassau County (N.Y.) Republican Party returned indictments against the petitioner (a deputy commissioner of conservation of the Town of Hempstead), two other public officials and Donald Woolnough, an official of the

County Republican organization. All four were charged with making false statements to the federal grand jury, in violation of 18 U.S.C. §1623.

On the date of their arraignment, the Republican Party provided a single lawyer, John Sutter, to represent all four defendants[1] (46).

The district judge expressed serious concern as to whether it was "utterly safe" for the same attorney to represent all defendants (9). One month later, Sutter wrote to the court saying, "It is patent that there is a real possibility that there is a conflict of interest," and stated that he would withdraw from the representation of petitioner and the other two public officials but continue the representation of Woolnough (15-16). This letter was never sent to the petitioner, nor was he advised of its contents.[2] Sutter never withdrew as attorney but thereafter continued his representation of all four defendants.

Woolnough was one of the "prime targets" of the grand jury investigation (13). Upon Sutter's motion his indictment was dismissed before trial. Yet, no pretrial motions of any kind were made in petitioner's behalf.

Petitioner repeatedly, both orally and in four letters (47, 423, 447-453) requested conferences with Sutter for the purpose of making pretrial motions and discussing trial strategy, including the subpoenaing of witnesses and documents to aid in the defense. Except for three conferences, totalling 45 minutes, Sutter did not see petitioner between March 18th and August 31st, 1976 (423).

1. References are to pages of the appendix filed in the Court of Appeals, which has been requested to be certified to the Court.

2. The letter was discovered in a co-defendant's file after petitioner had been convicted and the District Court clerk's file was being indexed for the appeal.

On August 31st, 1976, the lawyer appeared before the District Court and advised the trial judge that petitioner was "obviously trying to avoid the due processes of the law" (21). This representation was made although petitioner had previously been told by Sutter that he could drive his son to Cornell University on that day. Indeed, Sutter was aware of the exact location of petitioner at all times (428-429). Upon the basis of Sutter's claim that his client had refused to appear, the trial court issued a warrant for petitioner's arrest (30), but suspended execution thereof until 10:00 A.M., September 1st to allow Sutter to communicate with his client and request his appearance (30). Although Sutter's law clerk actually spoke by telephone with petitioner at 12:30 A.M., September 1st, he never advised him of the issuance of the arrest warrant (432), and Sutter never advised the court of the fact of this conversation and of petitioner's plans immediately to return to Long Island as requested (39). As a result, when petitioner drove home that same day, he was arrested upon arrival by two United States Marshals (433).

Appearing immediately after his arrest before the district judge, petitioner told the court of his complete inability throughout the previous months to obtain meetings with Sutter (47-48) and that Sutter knew at all times exactly where he was, and that Sutter's law clerk had actually spoken with him by telephone (45). He also advised the court,

> "So on the day of my indictment, the Republican Party provided counsel, I had very grave misgivings. I thought that my best interests and the interests of the party might be diametrically opposite.
>
> But there was no way to turn" (46).

This conflict of interest claim by the petitioner was not responded to by the court. At this point, petitioner did not know

of Sutter's prior letter to the judge in which Sutter expressed a potential conflict of interest. The judge did not mention Sutter's letter to petitioner, and no inquiry or hearing on the conflict of interest claim was ever held.

The next morning, petitioner placed on the record his complaints about the lawyer furnished to him by the political organization and read to the court portions of the letters that he had written to Sutter, asking for "establishment of communication with you for the purpose of preparation" (76).

The judge pointed out to Sutter that petitioner "has felt free to criticize your conduct as a lawyer in devastating terms" (90), and suggested a short adjournment for him "to reach a clarification" with petitioner (91). After the recess Sutter announced that he and petitioner "now have an understanding between each other which did not exist previously" (93). During the recess Sutter promised petitioner that he would subpoena certain witnesses and documents (435), although during the course of the ensuing trial, no subpoenas were issued and no witnesses were called. At no time did the court inquire of petitioner as to the circumstances under which he had apparently completely changed his position and decided to continue with Sutter as his attorney.

The trial was punctuated by a number of extraordinary comments made by Sutter about petitioner, most at sidebar, out of petitioner's hearing. Among the most outlandish were counsel's description of petitioner as "a genuine neurotic" (26); "a boatload of bananas" (328); and "a bunch and a half of diamonds" (293). Counsel also advised the trial court (the trier of the fact in this non-jury case!) that certain of petitioner's material defenses, (*e.g.*, that the grand jury transcript was inaccurate) lacked believability (84-85; 87; 274)[3]; and that certain

3. Yet the significance of such testimony is evidenced by the fact that one of the findings of the trial court was that the grand jury testimony "is an accurate transcript of the questions asked of defendant and the answers he gave during his interrogation before the grand jury" (394).

evidence which petitioner was about to give from the witness stand was "not going to be of any significance, I can assure you" (328). A glossary of the statements made by petitioner's trial counsel either in his absence or at sidebar is annexed to this petition.

On September 2nd, 1976, petitioner was examined by a physician in the hospital emergency room, who reported to the trial judge that petitioner "is at a point of nervous exhaustion . . . I feel that he should be home in bed [with] sedation until 9/7/76" (96; 484). The same physician had examined petitioner on August 17th and found him to be "exhausted" and "marked anxious" with "difficulty concentrating on what he was doing and saying". The physician referred to petitioner's diabetic condition and chronic anxiety (486). Veteran Administration records which would have been available to subpoena, showed that petitioner since World War II service in England and France, suffered "anxiety state, chronic, severe, with obsessive features and manifested by inability to concentrate, garrulousness, restlessness, and compulsive behavior". A 1961 Veterans Administration report diagnosed him as having "Anxiety reaction with paranoid schizophrenic features, severe. Incapacity marked, veteran is competent."[4]

On September 2nd, Sutter reported petitioner to be "emotionally disturbed to the extent . . . that he cannot cooperate in the defense. . . . He at this point is incapable of conferring with me" (93-94); "I have not been able to rationally communicate with this defendant. . . . I can tell you, quite candidly, when we spoke, he was weeping; he was disturbed" (97).[5]

4. Quoted in the presentence memorandum submitted on behalf of the petitioner filed with the District Court and made part of the record in the Court of Appeals, pages 2-3.

5. During the noon recess, September 2nd, prior to counsel's making these comments, petitioner's physician doubled his librium prescription to 10 milligrams, four times per day (468).

Sutter requested an adjournment, stating, "Take a look at my defendant. Can you possibly put him on trial in his condition now? I can't go to trial with a man in that condition Judge. I don't think it is proper and I can't get up here and waive the right that he was [trial by jury] without his knowledgable consent" (102). However a few moments later, Sutter inconsistently asked the petitioner, "Do you still desire to waive a trial by jury?" (110). Petitioner apparently murmured an affirmative response (110) since Sutter then stated, "I believe he said 'yes, I will'. I don't know if your Honor heard it. Mr. Graber, could you speak a little louder."

The trial was adjourned to September 7th and the court ordered an examination under 18 U.S.C. §4244. The next day, September 3rd at 8:30 A.M., petitioner was rushed by fire department emergency squad to Mercy Hospital, where he was diagnosed as having anxiety exhaustion, dehydration, gastritis and a possible coronary (469). Upon his return from the hospital and while under medication, the petitioner received an urgent telephone call from Sutter's law clerk, to go the Veterans Administration Hospital in Northport, an hour away, for the Section 4244 examination (469).

The court never placed in the record the results of the Section 4244 examination or inquired as to petitioner's competency, but simply accepted the jury trial waiver and proceeded with the trial (118).

REASONS FOR GRANTING THE WRIT

I.

Petitioner's claims of ineffective assistance of counsel were measured by an improper standard; and since the Second Circuit standard and those in the other circuits are in conflict, this Court should resolve the conflict and fix a uniform standard.

Although the Court of Appeals rendered no opinion, the trial court made it clear that petitioner failed "to meet the required standard" regarding his claim of ineffective assistance of counsel (473). The Second Circuit requires that such claims be rejected unless the lack of effective assistance of counsel is of such a kind "as to shock the conscience of the Court and make the proceedings a farce and mockery of justice." *United States v. Wright*, 176 F.2d 376, 379 (2d Cir. 1949), *cert. denied*, 338 U.S. 950 (1950); *Rickenbacker v. The Warden, Auburn Correctional Facility*, ___ F.2d ___, Slip. Op. 1063, 1070 (2d Cir. December 22, 1976); *Lunz v. Henderson*, 533 F.2d 1322, 1327 (2d Cir. 1976); *United States v. Yanishefsky*, 500 F.2d 1327, 1333 (2d Cir. 1974); *United States ex rel. Walker v. Henderson*, 492 F.2d 1311, 1312 (2d Cir.), *cert. denied*, 417 U.S. 972 (1974); *United States v. Sanchez*, 483 F.2d 1052 (2d Cir. 1973), *cert. denied*, 415 U.S. 991 (1974); *United States ex rel. Marcelin v. Mancusi*, 462 F.2d 36, 42 (2d Cir. 1972), *cert. denied*, 410 U.S. 917 (1973); *United States ex rel. Scott v. Mancusi*, 429 F.2d 104, 109 (2d Cir.), *cert. denied*, 402 U.S. 909 (1971); *United States v. Katz*, 425 F.2d 928, 930-31 (2d Cir. 1970); *United States v. Wojtowicz*, ___ F.2d ___, Slip Op. 1905 (2d Cir. February 22, 1977).

The other circuits apply conflicting rules: The District of Columbia Circuit inquires as to whether a defendant had "reasonably competent assistance of an attorney acting as a diligent, conscientious advocate", *United States v. DeCoster*, 487 F.2d 1197, 1202 (D.C. Cir. 1973). The Third Circuit states "the standard of adequacy of legal services as in other professions is

the exercise of the customary skill and knowledge which normally prevails at the time and place." *Moore v. United States*, 432 F.2d 730, 736 (3rd Cir. 1970) (en banc). The Fifth and Sixth Circuits hold that the test is having "counsel reasonably likely to render and rendering reasonably effective assistance." *United States v. Fessel*, 531 F.2d 1275, 1278 (5th Cir. 1976); *United States v. Toney*, 527 F.2d 716, 720(6th Cir.1975). The Seventh Circuit says that the attorney's performance must meet "a minimum professional standard." *United States ex rel. Williams v. Twomey*, 510 F.2d 634, 640 (7th Cir.), *cert. denied sub nom., Sielaff, Corrections Director v. Williams*, 423 U.S. 876 (1975). The Eighth Circuit says "the standard would be to test for the degree of competence prevailing among those licensed to practice before the bar." *Johnson v. United States*, 506 F.2d 640, 646 (8th Cir.), *cert. denied*, 420 U.S. 978 (1974).

This conflict is likely to continue unless resolved by the Court. A majority of the courts of appeals have had an opportunity to deal with the question and it does not appear likely that the conflict will resolve itself in the absence of a determination by this Court.

Upon an appeal to this Court, petitioner would argue that the Second Circuit standard is unfairly stringent, and that the proceedings below in any event constituted a farce and mockery of justice and denied petitioner his constitutional right to due process of law.

Petitioner submits that the proceedings below so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

II.

The trial court's failure to advise petitioner of his attorney's statement that "it is patent" that a conflict of interest is "a real possibility," deprived petitioner of the opportunity to make a knowledgeable decision as to whether to continue with the same trial lawyer.

Trial counsel's April 1976 letter to the trial court was never revealed to petitioner either by the court or by trial counsel. When petitioner on September 2nd acquiesced in the continuance of Sutter as his trial counsel, he did not know that Sutter had previously advised the court of a "patent" possibility of a conflict of interest.

Petitioner submits that an attorney's representation to that effect may not be ignored by the court. Since it was based at least in part upon confidential communications received by Sutter from each of four separate clients, the court was bound to accept Sutter's statement and see to it that he did not continue to represent petitioner. Not only did the trial court permit Sutter to continue his representation of petitioner, but petitioner was kept in ignorance of his attorney's prior conclusion relative to conflict of interest.

In the context of this case, where the Republican organization, the main focus and target of the grand jury investigation, provided one lawyer to represent petitioner and the three other indicted persons, it was an obligation of the trial court to ensure that no conflict continued.

After petitioner's arrest he specifically advised the court of his "grave misgivings," telling the court that "I thought that my best interest and the interest of the Party might be diametrically opposite" (46). This statement, together with petitioner's "devastating" criticism of Sutter's refusal to prepare the case or meet with him, should have set off alarm bells, bringing to the

trial judge an awareness that the "real possibility" of conflict of interest had, indeed, become an actuality.

The fact that counsel, after the trial began, embarked on a course of conduct designed to demean and derogate petitioner to the trier of the fact, provided further strong indications that the lawyer's interests and those of his client were not aligned. These most extraordinary comments made by a lawyer about his own client to the trier of the fact most certainly would have been stopped or resulted in a mistrial had they been made to a trial jury. In effect, these comments made the lawyer an unsworn witness against his own client. Such conduct was an egregious departure from the norm expected of a reasonably competent trial attorney.[6]

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6. It was also a substantial departure from the Code of Professional Responsibility, which was adopted by the New York State Bar Association as its own Code of Ethics, effective January 1, 1970; said Code provides as follows:

"DR 7-101. Representing a Client Zealously
(A) A lawyer shall not intentionally:

* * *

(3) Prejudice or damage his client during the course of the professional relationship, except as required under DR 7-102(B).

* * *

DR 7-106. Trial Conduct

* * *

(C) In appearing in his professional capacity before a tribunal, a lawyer shall not:

* * *

(Cont'd)

Finally there were suggestions, never developed fully until after the guilty verdict, that there was a "cover up" of information vital to the defense. On October 4, 1976, prior to the filing of the verdict, Sutter told the court that —

> "If your Honor please, I have received certain information from Mr. Graber and I have my licensed private investigator with me here today concerning matters which were unknown to the defense and which I believe, although I cannot accuse at this stage, to have been deliberately withheld from the defense, not by the Prosecution, but by certain governmental agencies."[7]

Counsel's request to withhold judgment was denied by the court "on so vague and thin a showing".[8] In the post trial motion, however, petitioner asserted that Sutter had had — but not submitted — a handwritten note from Commissioner Harold Udell barring petitioner from access to certain files and records (455).

In short, the suggestion of conflict of interest and the corroborating indications of the actual existence of such conflict, were too strong to be denied or dismissed by the court and

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(Cont'd)

(3) Assert his personal knowledge of the facts in issue, except when testifying as a witness.

(4) Assert his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused."

7. Transcript of October 4, 1976 proceedings, page 3, part of the record in the Court of Appeals.

8. *Ibid.*, page 6.

should have resulted in either a direction to petitioner to obtain new counsel, a mistrial or a new trial.

This case is a suitable companion case to *Holloway v. Arkansas*, 260 Ark. 250, 539 S.W. 2d 425 (1976), *cert. granted*, April 18, 1977, No. 76-5856.

In *Holloway*, the court required three defendants to continue with the same lawyer although their interests appeared to be adverse to one another. In this case, the lawyer, based in part upon confidential communications with four separate clients, announced his conflict to the court and the court failed to act upon it, and, indeed, never advised petitioner of his lawyer's statement! Instead, the trial court indicated its preoccupation with compliance with the Speedy Trial Act, and pointedly stated that the trial "must be commenced" "next week at the latest" (90). At no time was defendant advised that he could change attorneys or that the provisions of the Speedy Trial Act could be waived.

III.

The trial court had a duty to inquire into the relationship between petitioner and his attorney in order to preserve petitioner's Sixth Amendment right to effective assistance of counsel.

Not only the indications of conflict of interest, but petitioner's "devastating" attack upon his attorney and his documenting of his attorney's unwillingness to meet with him to prepare the case, should have placed the court on notice that there was a conflict between client and attorney of such serious proportions as to interfere with petitioner's Sixth Amendment rights. Instead of merely directing that the attorney meet with his client in a side room to reach "some clarification" with him, the court should have examined the relationship between the client and his attorney in order to assure that the petitioner's

Sixth Amendment rights were protected. The only statements appearing on the record relative to the attorney-client relationship after the "clarification" conference were the attorney's statement, "Mr. Graber and I now have an understanding between each other which did not exist previously" (293) and petitioner's simple statement the following Tuesday, "I do have an attorney-client relationship at this time" (119). However, the attorney's statement was totally worthless, since a moment after he made it he also told the court, "Mr. Graber is emotionally disturbed to the extent, if your Honor please, that he cannot cooperate in the defense" (93). Petitioner's statement should not, without a fuller inquiry, have been accepted by the court because (a) it was made in ignorance of Sutter's admission of potential conflict of interest; (b) it was made after the court had advised petitioner that under the Speedy Trial Act his trial must begin that week; and (c) it was made by a person whose emotional, psychiatric and physical condition were in serious question as late as the prior Friday, September 3rd, when he was taken to a hospital emergency room for the second time in 24 hours, and petitioner had just been subjected to a court-ordered Section 4244 examination, the results of which were never spread upon the record.

IV.

The trial court was under an obligation to advise petitioner immediately of his attorney's derogatory statements about him and thereafter to refuse to conduct any proceedings in the absence, or out of the hearing, of the petitioner.

The moment defense counsel began to make derogatory and demeaning remarks about his client, out of the client's hearing, the trial court was under an obligation to advise petitioner of his attorney's statements. There was no acceptable reason for proceedings to take place at sidebar in a non-jury trial. The single consequence of such bench conferences was that petitioner — the only individual whose interests were at issue in this

criminal felony trial — was the only person excluded from the proceedings.

Such a procedure, even in a case where derogatory remarks had not been made about the defendant on trial, violates a criminal defendant's right to participate in his trial and to enjoy a public trial.

In this case the sidebar conferences violated even more significant rights of the petitioner: to be confronted with witnesses against him and to have the assistance of counsel for his defense.

The comments of petitioner's attorney, in effect, made the attorney an unsworn witness against him, and if that were not serious enough, a witness whose statements the petitioner did not hear and could, therefore, not rebut.

The fact that it was his own lawyer who made these comments not only stripped petitioner of the assistance of counsel for his own defense but made his counsel an advocate for the prosecution.

It was, in petitioner's view, obligatory for the court to have stopped the proceedings and immediately advised petitioner of what had transpired. The court should thereafter have refused to conduct any proceedings out of the petitioner's presence or hearing.

There is a point beyond which collegiality between adversary counsel and the court intrudes upon the rights of the defendant on trial. Petitioner submits that in this case that point was passed.

V.

It was improper to accept a jury trial waiver without a hearing, where petitioner's prior condition impelled the court to order a psychiatric examination under 18 U.S.C. §4244.

The trial court directed petitioner be examined under 18 U.S.C. §4244 (35, 109). The cited statute is properly invoked at any time there is "reasonable cause" to believe that a defendant "may be presently insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly to assist in his own defense."

After the Section 4244 examination was ordered, the court was under an obligation to make the findings of such examination part of the record prior to accepting defendant's jury trial waiver. This was never done.

Moreover, there was no investigation whatsoever made by the court into the constitutional validity of the petitioner's waiver. There is, therefore, no evidence in the record from which it could be ascertained on review that the waiver was voluntary. *Estrada v. United States*, 457 F.2d 255, 256 (7th Cir. 1972).

The District of Columbia Court of Appeals in *United States v. David*, 511 F.2d 355, 361 (D.C. Cir. 1975) indicated that trial judges "would be well advised to directly question the defendant in all cases to determine the validity of any proffered waiver of jury trial. Such questioning is, of course, particularly crucial where circumstances cast doubt upon the validity of a given waiver". Similar holdings have been made by the Fourth Circuit (*United States v. Hunt*, 413 F.2d 983, 984 [4th Cir. 1969]) and the Third Circuit (*United States v. Mitchell*, 427 F.2d 1280 [3rd Cir. 1970]).

This Court held in *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), that "...whether there has been an intelligent waiver

depends upon the facts and circumstances of a particular case including the background, experience and conduct of the accused".

Among the circumstances which particularly cast doubt upon the validity of the waiver in this case is the serious question, already known to the judge at the time of the Section 4244 examination, about whether petitioner in executing the jury waiver was advised by an attorney having an undivided loyalty to his client. The doubt as to Sutter's standing to represent petitioner coupled with petitioner's manifest condition made the holding of a competency hearing or an inquiry into the constitutional validity of the waiver an absolute necessity.

VI.

The petitioner's answers before the grand jury were not perjurious within the meaning of *Bronston v. United States*, 409 U.S. 352 (1973).

Petitioner was indicted and convicted for making a false statement to a grand jury "in that he had suggested to Town of Hempstead employees that they should give a portion of their annual salaries to the Republican Finance Committee, and he had approached Town employees to solicit such contributions." (8).

The transcript of the petitioner's grand jury testimony (487-503) reveals that at no time was petitioner asked whether he "had suggested" to Town of Hempstead employees that they make contributions or whether he had "approached" them to solicit such contributions.

In other words, the perjury indictment and conviction were pieced together out of discursive answers to other questions. The court's guilty finding was merely based upon a conclusion that "the answers produced, and were intended to produce, the

impression that the defendant was not active in the solicitation of 1% contributions from employees of the Town of Hempstead, but was merely one who stood passively ready to transmit contributions voluntarily offered to him . . . " (415).

We say that a total reading of petitioner's grand jury testimony shows that the answers given, to the extent that they were responsive, were accurate and truthful. The indictment and the verdict both suffer from an inherent weakness in that each relies upon an "impression" that the grand jury and court concluded petitioner intended to produce, and not upon the exact language of the answers themselves. Both the indictment and the verdict depend upon the reader's subjective interpretation of such vague and indefinite words as "active", "passive", "suggested", "approached" and "solicit".

Petitioner submits that his grand jury testimony admits that he played a role in the soliciting of political contributions and that his answers to the questions propounded to him before the grand jury were not only accurate, but were corroborated by the government's witnesses at trial.

CONCLUSION

Petitioner respectfully prays that a writ of certiorari be issued to the United States Court of Appeals for the Second Circuit to review the final judgment of that court dated March 31, 1977.

Respectfully submitted,

s/ Richard C. Cahn

CAHN AND CAHN, P.C.
Attorneys for Petitioner

Richard C. Cahn
David S. J. Neufeld
Of Counsel

Glossary of Comments By Petitioner's Trial Counsel At Sidebar Bar Or In His Client's Absence

PAGE

"Judge, we have a man of great ego here, my defendant, I am talking about. A man who is extremely upset, extremely nervous, and is obviously trying to avoid the due processes of the law." 21

"Judge, if I may, as a layman, I believe he is a genuine neurotic but he is not a psychotic * * * I must say I apologize again on behalf of my client. I don't like it either because I had to appear here and I drove from Mineola with this." 26

"If your Honor please, the defense counsel is ready to proceed. I don't know if there exists a satisfactory attorney-client relationship." 73

"If your Honor please, you can obviously see that there is a difficulty between attorney and client in this particular matter. I have received from Mr. Graber accusations concerning the United States Attorney. *I have my own opinion as to the believability of those things* concerning Mr. Caden and my relationship with Mr. Caden has been most honorable at least in my opinion. *I don't know what his is.* [Emphasis supplied].

I find it difficult to believe that the certified shorthand reporter employed by the United States government would deliberately falsify grand jury testimony. I find that rather difficult. Can there be errors? There can be errors in anything. Can there be omissions? Yes.

Falsification, I find hard to believe. I find it difficult to believe that a gentleman of the stature of Mr. Caden would threaten witnesses, would employ all of those things that we would find abhorent in the practice of the criminal law" 84-85

"I want to say very frankly I abhor the accusations against Mr. Caden and the United States Attorney's staff. I have not found those to be verified in any manner whatsoever." 87

"I told your Honor that the other day and I have appeared every time. I am not preparing to go ahead. My defendant is not . . . ." 100

"He now has his own ideas with respect to what the defense should be, they don't concur with mine." 273

"in order that I can go over all of these witnesses with him whom I - I don't think they have any relevance in this case and I am candid to say that. So that there can be no criticism of anybody's conduct with respect to this case in the event that there should be a conviction." 273

"He's got some nasty things to say about Mr. Druker and he denies that the transcript is accurate and things of that nature, of which there is no question about, your Honor" 274

"Last night we reached an agreement concerning other witnesses and now he has just revoked that agreement at the recess and wants other things done." 275

"I am asking you that we don't have any defects in this case wherein he is going to claim or be it in my opinion that he is incorrect that he wasn't afforded an adequate opportunity." 275

"it is just that I don't want any criticism leveled with respect to any possible conviction." 277

"Judge, I am a believer in finality. I happen tobe a trial attorney and I understand these situations, but this is a very difficult man. As a matter of fact he is the only one besides myself who I can't figure out." 277

"I only want to use this to refresh his recollection as to his state of mind when he testifies today. I'm dealing with a bunch and a half of diamonds and you can admit that." 293

"Judge I don't believe I have anything more but I don't want any more trouble from him." 327

"I am telling you it's my present intention. *This guy is a boatload of bananas.* If he insists upon something, I'm going to have to do it. You follow. *If it does get into any other areas, they're not going to be of any significance, I can assure* you." [Emphasis supplied.] 328

APPENDIX A

FINDINGS OF JUDGE DOOLING

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - -X

UNITED STATES OF AMERICA,

-against-

RAYMOND GRABER,

Defendant.

- - - - - - - - - - - - - - - - - -X

75 CR 166

SPECIAL FINDINGS OF FACT and GENERAL FINDING

Appearances:

JOHN CADEN, Esq. (DAVID G. TRAGER, Esq., United States Attorney, of Counsel) for the Government

JOHN JOSEPH SUTTER, Esq. for the defendant

DOOLING, D.J.

In response to allegations of the existence of a corrupt political contribution system in Nassau County the United States Attorney for the Eastern District of New York initiated an investigation, and, in connection with the investigation, a Special Grand Jury was duly impanelled in January 1975 to conduct an inquiry into the charges of a corrupt political contribution system in Nassau County (Rule 6(a), (g), Federal Rules of Criminal Procedure). Specifically, the inquiry was directed to determining whether there was or was not prevalent in Nassau County public offices a system under which employees were expected and required to pay 1% of their annual pay to committees of the Republican Party, whether such a system of contributions,

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if it existed, was voluntary or was brought about by coercion, and whether any violations of federal law were involved. The federal statutes in contemplation were the penal sections of the Civil Rights Act, 18 U.S.C. 241 and 242 and the Hobbs Act, 18 U.S.C. 1951 which, among other things, proscribes affecting commerce or the movement of any articles in commerce by extortion or conspiracy to do so. The investigation continued from January 1975 into the year 1976. In the course of it federal investigators conducted some 1500 interviews, from 300 to 400 witnesses were called in and their testimony was presented to the Grand Jury.

Witnesses before the Grand Jury gave testimony which indicated that the Department of Conservation and Waterways of the Town of Hempstead was an office in which 1% contributions were given to the Republican Finance Committee of the Town of Hempstead; in that connection there was testimony that indicated that defendant was involved as a solicitor, collector or transmitter of 1% contributions. The defendant was accordingly subpoenaed to appear before the Grand Jury and did appear before the Grand Jury on July 11, 1975.

No substantive indictments have resulted from the Grand Jury investigation of the 1% system that was alleged

to have prevailed in Nassau County public offices, but the progress of the investigation and of the Grand Jury inquiry was regularly reported to the Civil Rights Division of the Department of Justice in Washington and minutes of the Grand Jury proceedings were sent to Washington periodically for its consideration. The only indictments which have resulted from the Grand Jury investigation have been perjury indictments.

The defendant appeared before the January 1975 Special Grand Jury on July 11, 1975 at about 11:00 in the morning. A number of other persons had been subpoenaed to testify before the Grand Jury on the same morning and the defendant may well have derived from the circumstances an impression that the Assistant United States Attorney was pressed for time and that defendant would be expected to testify quickly.

The transcript of the Grand Jury testimony of the defendant is an accurate transcript of the questions asked of defendant and the answers he gave during his interrogation before the Grand Jury, The defendant was duly sworn by the foreman of the Grand Jury. The Assistant United States Attorney, after asking the defendant whether or not he was employed by the Town of Hempstead and ascertaining that he had for nearly two years been Deputy Commissioner

of the Department of Conservation and Waterways, advised the defendant that the Grand Jury was looking into allegations that Town of Hempstead employees had been coerced into giving portions of their salaries each year to the Republican Party. He was advised further that there had been "a fair amount of testimony" about the defendant's participation in the one percent scheme.

The Assistant then advised the defendant that he had a right to refuse to answer any questions the answers to which might tend to incriminate him, that anything he did say could be used against him in court at a later time, that he had a right to have an attorney of his choice to consult with outside the Grand Jury room, that he could consult with that attorney at any time by simply asking the foreman, and, finally, that if he could not afford counsel the court would provide him one. The defendant asked whether this was a routine statement. The Assistant answered that it was not, that, "[i]n all candor, ... if it is determined that there have been violations of the federal criminal statute, you might fit into the category as a defendant rather than a witness in that there has been testimony that you have participate' in the one percent thing as it is called; that you have actively solicited employees possibly pressured them and indeed, given them

cards of some sort with one percent figures on them."
(Tr. 3, lines 15 to 23). The Assistant explained that he did not say and it had not yet been determined whether or not such conduct was criminal but that he thought the defendant should know - and at that point the defendant interrupted. The defendant said that after Special Agent Walter Distler of the Federal Bureau of Investigation had telephoned him, he had telephoned to Republican Headquarters and confirmed that James Catterson was available as counsel.

Defendant then asked whether it was proper for Mr. Catterson to be in the jury room, saying

> "I mean you're putting it in a pretty grim light."

The Assistant United States Attorney explained that the law did not allow attorneys in the Grand Jury room but that at any point during the interrogation the witness could simply by asking go out and talk to his counsel privately. At that point the defendant stated that he did not think there would be any need for that, but

> "... what you just said is sort of scary."

The Assistant United States Attorney then pointed out that Mr. Catterson was outside, and that if defendant wanted to talk to him at once or any other time - but the defendant interrupted to say that he did not really think he wanted to

Defendant was then asked whether he desired to waive his constitutional rights and to testify before the Grand Jury. Defendant answered that he would certainly testify and that no threat or promise had been made by the Assistant United States Attorney or anyone else.

Defendant's testimony on the topic of inquiry occupies about 12 pages in the transcript (Tr. 5, line 14 to Tr. 16, line 9). He was first asked whether he had heard anything to the effect that the Town employees were expected to give one percent of their salaries to the Republican Party each year. He answered

> "No other than in the newspapers for many years. ... Through the years, the various officials of the Party have openly admitted; its appeared in newspapers through the years, that many well, in our case since I think you can encompass more in the Town of Hempstead that many of the town of Hempstead employees contribute and a figure is made in many cases about one percent."

His answer was somewhat further extended and he was then asked -

> "Q Did you hear anything to the effect that Town of Hempstead employees are expected to give one percent?
>
> A No. All I know is that I read in the paper. Specifically, nobody ever told me at any point that I must give one percent."

Defendant's attention was drawn to the fact that his 1974 salary was recorded as $20,159 and that his Party contribution around election time was $202. He was then asked how he had arrived at that figure. After some further questioning about the amount of the salary and of the contribution the witness was again asked, "How did you arrive at the $202 figure?" And he said -

> "Okay I would pinpoint it this way. As I previously stated, I joined the Town of Hempstead in late September of 1966. At that time, my department was in its inception. It was just a nucleus being formed. It was a new and imaginative, way ahead of its time concept in environmental protection."

At that point the Assistant United States Attorney interrupted the witness and said -

> "As you can see, I'm obliging you at your request here, as you can see. There's a hallway full of people out there that we are trying to get out of here by lunchtime. And if we can stick to the question, we'll be a lot better off."

The Assistant then returned to the questioning and said

> "Q You sat down in 1974 and you made out a check for $202.
>
> A Right. Good. You asked me --
>
> Q How did you arrive at this figure?
>
> A Perhaps I've been too wordy but I tried to explain it. In any event in mid-October

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at that time having a small office, you know, just several people, I heard Yolanda Rider Speranza ..., Carl Lebek -- ... Thomas Laurencelle ... And Gino Aiello. .... They were all sitting around in a bull session discussing the fact that they received, I believe, a campaign finance letter and that they were all going to contribute one percent. One of the four, I do not recall which of the four, said to me 'you ought to contribute one percent too.'

"Q What year was this?

A This was 1966.

The defendant explained that in that year, having been unemployed for a year before he hired on, he had made only a token contribution but that in the ensuing years he had made a one percent contribution "just like every body else."

Defendant was then asked the first of the questions quoted in the indictment (Tr. 9, line 7).

"Q All right. Now, did you play any role within your department in actively soliciting these contributions from employees under you at any time?"

The defendant's answer in substance was that he acted in each and every year after 1966 as the transmitter of contributions, but would not have been so presumptuous as to say to anyone "you should give one percent." He said, indeed, that when his secretary asked him what everyone was talking about with reference to one percent, he told her that she would have "to get that information from somebody else." He

continued -

> "In other words, feeling in my position, that I should not be the originator of such a thing."

The Assistant United States Attorney then said,

> "Q All right. Let me ask you this then.
>
> A Incidentally I do not wish to commit perjury. There is a little more to that.
>
> Q All right. Hold on.
>
> A I don't want to commit perjury."

The Assistant United States Attorney then asked the second question quoted in the indictment -

> "Q A number of employees have testified that you would come around and give them a three-by-five or a similar card on which it would have their name, their salary, and a handwritten notation somewhere on the card which was a figure representing one percent of their salary. Now, first of all, has that occurred?"

The defendant answered that cards showing the employees' names and salaries were indeed prepared, but the substance of his testimony was that this was done as a convenience to employees who wanted to know what their salaries were so that they, acting on their own initiative, could figure one percent on their salary. Speaking of department employees who were not in the main office where defendant was stationed but at scattered locations, the defendant said "I rarely see

them. I have no direct communication with them. I have never solicited them. Okay?" He explained that at times he gave such 3 x 5 cards as were referred to in the question to supervisors for distribution to the men working under their direction at locations outside the main office. He said in this connection that he had received so many requests for salary data that

> "...I did give some to some supervisors with these instructions, so help me God! 'You have this. You've been asking for it for some. There's gonna be more. I'm too busy preparing a budget. They are only to be given to a man if he asks you a question which specifically can be answered by you.' And there was no one percent figure on those cards."

The indictment charged that the quoted testimony of the defendant, as he then well knew and believed, was not true in that

> "... he had suggested to Town of Hempstead employees that they should give a portion of their annual salaries tb the Republican Finance Committee, and he had approached Town employees to solicit such contributions."

The Government's evidence at the trial established beyond a reasonable doubt that the defendant both had solicited, on behalf of the Town of Hempstead Republican Finance Committee, contributions equal to one percent of

annual compensation and had suggested to Town of Hempstead employees that they give one percent of their annual compensation to the Republican Finance Committee of the Town of Hempstead. The evidence of the witnesses was that in August or September of each recent year before 1975 the defendant would remind them that one percent time was at hand, and that he would do this without being asked by employees whether or not they were expected to contribute or whether or not it was time to make a contribution to the Republican Finance Committee.

The defendant, in the case of employees within the headquarters office of the department, personally approached employees and received checks from them. In the case of employees not working in the main office or headquarters, defendant would advise their respective supervisors that it was time for the employees under their supervision to be reminded that it was the time of year to make a one percent contribution. Defendant supplied to the supervisory employees lists of the employees in their locations with their annual salaries, and the evidence was that departmental employees in places outside the main office who failed to make contributions, or who had some reason for not being able to do so, were told to take the matter up with defendant.

The evidence was, and it is credible, that defendant did cause cards to be prepared for the departmental employees, each card showing the name of the employee and his annual salary, and that the cards in at least one year also had the one percent amount computed on the card. There was no evidence that the supervisory employees or any other employees had taken the initiative and had themselves asked defendant either for lists or for cards in order to serve as a convenience to those who might not recall the exact amount of their compensation (inclusive of overtime).

There was considerable credible evidence that defendant did not advise certain employees that contribution was mandatory, or say to them that a failure to contribute could affect either their hiring by the Town, their promotion, their receiving overtime, or any other expectable employment advantage that discretionary authority could deny to them. However, there was also credible evidence that defendant told one employee who had failed to make a contribution that he would not receive overtime because of his failure to make a contribution. The employee in question took the matter up with defendant's superior, Commissioner Udell, who cancelled the prohibition of overtime; it appears that the employee lost not more than one Saturday morning's overtime. There was credible evidence also that defendant

gave another employee to understand that if he wished to be reclassified to a certain advantageous compensation basis he would be expected to make a contribution. The employee then tendered a $75 money order to defendant which defendant first rejected but later accepted. After a considerable lapse of time the employee did receive the desired classification. When "one percent time" arrived later in the same year the employee contributed, in addition to the $75 already contributed, approximately one percent of his annual pay.

The evidence supports beyond a reasonable doubt the inference that defendant did advise employees to make contributions equal to one percent of their annual salary rounded to the nearest full dollar. In the case of one employee who had been solicited through her supervisor to make a one percent contribution, the employee, opposed to being expected to make any contribution at all, drew a check in an amount equal to exactly one percent of her annual salary - $81.67. After a lapse of two weeks defendant returned the check to her and told her to write a new check rounding the amount off; thereupon the employee did write and give to the defendant an $82 check.

The evidence in the case thus leaves no escape from the conclusion that the defendant was an active participant

in the solicitation of one percent contributions from Town employees and in suggesting to them that their contributions should be a portion, that is, one percent, of their annual compensation. The solicitation and suggestion was made directly to main office employees, and was made indirectly, through supervisors, to employees at locations outside the main or headquarters office.

Defendant contends that he was not given an opportunity to complete his answers but was hurried and interrupted before he had completed his answers to the questions quoted in the indictment. He contends that the answers that he gave are, upon analysis, seen to be so unresponsive and inexact that they could not form the basis of an indictment under 18 U.S.C. 1623 in the light of Bronston v. United States, 1973, 409 U.S. 352.

The circumstances of defendant's testifying before the Grand Jury bear directly on this question.

On June 11, 1975, one month before defendant testified before the Grand Jury he was interviewed by Special Agent Walter E. Distler of the Federal Bureau of Investigation. Mr. Distler credibly testified as follows:

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"Q Can you recall what if anything you and Mr. Graber discussed concerning employee contributions within his department?

A Yes, I asked him if he knew anything about the one percent. He indicated that he did and I believe he said he heard about it through scuttlebut from employees in the office.

He further indicated to me that when he first became employed with the Department of Conservation and Waterways he was requested by the Commissioner to act as a collector for any contributions that might be given by employees of that department.

Q Did you ask him whether or not he had anything to do with the soliciting of those contributions?

A Yes, I believe he did.

Q What if anything did Mr. Graber say?

A Mr. Graber said he had nothing to do with the soliciting of the contributions, but then he indicated to me that he did act as a collecting point for the contributions.

Q Did you ask Mr. Graber whether or not he had ever solicited contributions for the Republican Party?

A Yes, I believe I did and he indicated to me that as a member of the West Hempstead Republic Club which he said was a social organization he did on possibly one or two occasions go door to door soliciting contributions for the Republican Party.

Q Did you ask him after he said that or did it ever come up whether or not he had ever solicited contributions from employees of the Town of Hempstead?

A Yes, I think he ended that by saying that he never solicited contributions from the employees of the Town of Hempstead."

On cross-examination he was asked and answered the following questions:

"Q When you get into this word "soliciting," what did you intend by that word?

A Did he actually go to various employees and ask for contributions.

Q He told you "No"?

A That's right.

Q Mr. Distler, he did tell you, though, did he not, that he would have other people that were employed by the Town go out and ask for contributions?

A Not to my knowledge he didn't.

Q Did you ask him if he did?

A No, I did not."

Later in his cross-examination Mr. Distler testified:

"In your interview, did you ever ask Mr. Graber whether or not he suggested to Town of Hempstead employees that they should give a portion of their annual salaries to the Republican Finance Committee?

A No.

Q Did you ever in your interview with Mr. Graber ask him whether or not he had approached Town employees to solicit such contributions?

A No, I didn't."

In the context of the last two questions and answers the witness's answers appears to be directed to the precise verbs used - "suggested" and "approached." The witness's answers were not intended to withdraw the substance of what he had said in his direct testimony quoted above.

Defendant himself testified about his interview with Mr. Distler and the central point of his testimony was that Mr. Distler had not asked him whether he "solicited" contributions but had only asked him whether or not he had "collected" contributions. Defendant said in part

> "A The only word he used was "collect." I remember that. "Did you collect" and in order to answer him I had to define it. I said, "Mr. Disler, can you define what you mean by that? Do you mean if I actually solicited donations from individuals in my department, like one would if he went from doorbell to doorbell to doorbell in his neighborhood," meaning to each and every or virtually each and every person. Mr. Disler says "Yes, that's what I mean," and of course to that type of solicitation the answer is no and this is what I so told Mr. Disler, to that type of each and every or virtually each and every person like you do when you go down the block ringing doorbells. I have this "doorbells" and it's also in my second discussion with Mr. Disler via telephone because then we have a somewhat different version on the second -- when he called me and said that unlike the other departments --
>
> Q I must ask you --
>
> A I'll stop there. Okay.

In that frame of reference, my answer, after I got Mr. Disler to qualify what he meant by collect, the answer was then no.

Q You admitted to Agent Disler then that you in fact did solicit employees, co-employees, but not directly?

MR. SUTTER: Objection.

THE COURT: On what ground?

MR. SUTTER: On the basis --

THE COURT: You're arguing with him because of the word "then" in the question?

MR. SUTTER: Not only that, your Honor, but that's not the testimony of this witness.

THE COURT: I'll sustain the objection to the form of the question.

MR. SUTTER: Thank you, sir.

Q Did you tell Agent Disler that you solicited employee contributions?

A He never asked me.

Q Never asked you?

A Other than what he said, "Do you collect," I asked for a definition. By definition, going down the block, doorbell by doorbell. He said, "Yes, that's what I mean." I said, "The answer is no," and then his next question -- I may have the order wrong, you know. I don't know which order, but my notes "When you're hired by the Department of Conservation Waterways, did Francis D. Purcell tell you about one percent?" I said unequivocally, "No."

Shown Special Agent Distler's memorandum of the June 11th interview (dictated from his now destroyed notes by Mr. Distler on June 17th, six days after the interview), defendant in substance said that the memorandum did not refresh his recollection of the conference and that he disputed its correctness. He then was asked and answered:

> "Q What you dispute is you being attributed as having said during the course of that interview that you had absolutely nothing to do with soliciting these contributions and that you had merely acted as a collecting point for any contribution employees may desire to give. Is that what you dispute you didn't say that?
>
> A Either soliciting or collecting, either."

The witness had his own "debriefing" notes of the interview which he had made on the day of the interview, and when he was asked whether another part of Mr. Distler's memorandum refreshed his recollection he referred to his own debriefing note and then answered:

> "A This was written the same time. I have no recollection of that time nor the debriefing which I made immediately of the word "solicitation" ever being used or anything other than that --
>
> * * *
>
> Q You do not recall repeating to him a second time during the course of the interview that you had never solicited contributions from employees of the Town of Hempstead?
>
> A I say on the first interview he didn't ask me that."

Defendant was amply forwarned of the questions which he was likely to be asked when he appeared before the Grand Jury. There is no real disparity between what he said to Mr. Distler and his Grand Jury testimony. Nor is there any significant disparity between his reconstruction at trial of discussion of the Distler interview and the approach to the subject of the so-called one percent system which he took in testifying before the Grand Jury.

Defendant testified that he had heard of the United States Attorney's investigation early in the year and had talked about it with his superior, Commissioner Udell, before going into the Grand Jury. He further testified that Commissioner Udell had told defendant that Udell could not get himself involved, that the Commissioner could not admit that he had assigned the defendant to the matter each year and that Udell told the defendant in essence that he would be on his own. Defendant testified that Commissioner Udell had not wanted the defendant to refresh his (Udell's) recollection, that on the contrary, Udell wanted to cut off his talk with defendant altogether. Defendant said that this preyed on his mind. He was also concerned about what Commissioner Udell had said about Yolanda Speranza, Udell's secretary - or what a Gino Aiello had said - to the general

effect that defendant had twisted Yolanda Speranza's arm. He was concerned also about Udell's statement that one John Zuretsky "could hang us all." Defendant had earlier heard that before he (defendant) had been employed by the Town of Hempstead, Zuretsky had been denied a promotion because he had not made a contribution. Apparently at some point Commissioner Udell had allegedly designated defendant to remind Zuretsky to make contributions in future years. Defendant testified that when he was told in the Grand Jury that he was potentially a defendant he had an impression that all of this was connected with Commissioner Udell's intrigue and the Commissioner's own earlier appearance before the Grand Jury.

Defendant testified that he had consulted with Mr. Catterson before testifying, and that Catterson had tried to give him an insight into Grand Jury functions and how to answer questions and had spotted a couple of things for him. Defendant said that Mr. Catterson had told him that it would be good to include in his testimony something in praise of his department. Defendant told the Grand Jury, referring to the year 1966,

> "At that time, my department was in its inception. It was just a nucleus being formed. It was a new and imaginative, way ahead of its time concept in environmental protection."

defendant said that Mr. Catterson had also told him that before he explained something he should use an expression, "I don't want to be hairy about this." Before the Grand Jury defendant did say in answer to the solicitation question: "I don't want to be hairy about it."

Defendant testified that he was treated roughly in the Grand Jury room, that he was questioned in an accusatory manner, and that he was not permitted to complete certain of his answers. Defendant said that he got in touch with the United States Attorney's office right after he had testified and advised them that he felt that his testimony was incomplete because he was rushed, and he asked to have the Assistant United States Attorney recall him as a witness. He later consulted Mr. Catterson, who, he testified, told him that he had a problem with the United States Attorney's office and should go to see them. He went then to the FBI and an FBI man took him in to see the Assistant United States Attorney. The Assistant United States Attorney suggested to defendant that he retain an attorney and return. Defendant did retain an attorney and returned with him to see the Assistant United States Attorney. Defendant's attorney went over the Grand Jury testimony, and in the end, after the Assistant United States Attorney had

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suggested that defendant go into the Grand Jury again, defendant's attorney advised the Assistant United States Attorney in defendant's presence that he did not see perjury in the transcript and therefore was advising the defendant not to go back on the witness stand. Defendant accepted that advice.

At the trial defendant was asked on cross-examination, with reference to the visit to the Assistant United States Attorney, which took place on August 8, 1975, whether he had not stated to the Assistant that the testimony he had previously furnished to the Grand Jury on July 11, 1975, was true and correct. The defendant was unable to answer that question from his recollection but answered

> "Seeing my Grand Jury notes, I would say my Grand Jury notes are true, my Grand Jury testimony is true."

On re-direct examination the defendant in substance testified that he did tell supervisors to go about and see if they could get political contributions for the Republican Party, that he solicited many people for contributions and that he did this at the direction of the Commissioner.

Taking into account all of the evidence both relating to the period before his Grand Jury testimony and

after it, as well as defendant's testimony at the trial, it is concluded that the defendant was not prevented from continuing his testimony before the Grand Jury in any manner that was improper or that resulted in the defendant's failing to convey his complete response to the questions asked. While the answers that he gave were discursive in the extreme, they dealt directly with the questions asked. In each case the answers produced, and were intended to produce, the impression that the defendant was not active in the solicitation of one percent contributions from employees of the Town of Hempstead, but was merely one who stood passively ready to transmit contributions voluntarily offered to him for transmittal to either Commissioner Udell or to the Republican Finance Committee of the Town of Hempstead. So far as the furnishing of cards was concerned, defendant's position was made perfectly clear and was completely described; he testified before the Grand Jury that he did not prepare cards as an integral part of the system of soliciting campaign contributions, but, rather, had cards prepared in response only to requests for salary data addressed to him and as a convenience to those employees who either directly or through their supervisors sought, or were expected to seek, information about their salaries, so that they could better compute their voluntary one

percent contributions. The defendant has not indicated either during trial or at or after he testified before the Grand Jury what additional testimony he had intended to proffer to the Grand Jury, and how it would have modified the effect of the testimony that he did give.

The suggestion has been that Bronston requires an inquiring attorney to pursue an evasive witness until his answer is explicitly responsive to the question asked. The defect of the questioning in Bronston was that the witness had very plainly not answered the second question in the sequence; he had answered a question that had not been asked, and the volunteered statement did not imply a response directed to the substance of the question asked. The first question had been whether Bronston had any bank accounts in Swiss banks at the time he was being questioned; he answered "No." The next question was "Have you ever had any Swiss bank accounts?" His answer was that his company had maintained such an account there for about six months, in Zurich. He then was asked whether any of his nominees either currently had or had ever had Swiss accounts and he answered "No." In fact Bronston had maintained a Swiss bank account which may well have continued in existence up to a date relevant to the inquiry. In Bronston

the second answer did not amount to saying, "No, I never had such an account, but my company did." It was consistent with an answer, "Yes, both I and even my company have had accounts in Switzerland." Hence the Court concluded that the answer could not be the foundation for a charge of perjury, saying (409 U.S. at 362)

> " . . . we are constrained to agree with Judge Lumbard, who dissented from the judgment of the Court of Appeals, that any special problems arising from the literally true but unresponsive answer are to be remedied through the 'questioner's acuity' and not by a federal perjury prosecution."

In the present case, in contrast, the defendant's answers, while discursive and circumstantial, were precisely responsive. They depicted his role; they conveyed very complete answers to the questions asked. The answers he gave could not have been deprived of their content as responsive and untrue by any words that the defendant could have added to them short of total and explicit recantation before the Grand Jury of the substance of the answers given.

Defendant gave evidence that as a result of his military service he had a service-connected disability affecting his mental condition, and it could be inferred from his courtroom performance that he is what is thought

of as temperamentally high strung. However, neither the text of his Grand Jury testimony, nor his statements and testimony in court, afford ground for inferring that he failed in self-possession either before the Grand Jury or in court. The inference is that in each place he was able to say what he intended to say.

GENERAL FINDING

It is found that the defendant is guilty as charged.

Dated: Brooklyn, New York
October 1976.

U. S. D. J.

APPENDIX B

ORAL OPINION OF THE DISTRICT COURT

[Tr. pp. 57 - 66 (12/10/76)]

THE COURT: Well, I think it was wise and good to have made the motion and to have made it in this

detail in which it has been made because I think that the questions raised are real and substantial, notwithstanding that I do think that a -- first, that a hearing is unnecessary because the issues of fact are not -- are not very real; and second, because I think that the papers on their face make out a total case which fails to meet the required standard.

Now, I quite agree with you that the mockery of justice standard of presentation is a standard -- the days of which are numbered even in our Circuit, though they are still given a certain amount of lip service. The standard used in the 6th and 9th Circuit seem to be a good deal healthier. I am not sure that the standards used in the District of Columbia or the Court of Appeals will ever be adopted. That would seem to require that in every case the Government proved its case twice, which is a little too much.

I think my first reaction to the situation between Mr. Sutter and Mr. Graber was, of course, produced -- formed and colored by what I heard from Mr. Sutter and Mr. Caden and by -- Mr. Caden's contributions, of course, came to him from Mr. Sutter because he was not directly in touch with Mr. Graber during these times. I think, however, that from the time when Mr. Graber was arrested and brought into Court,

I had a total suspension of judgment of who was telling the truth as between Mr. Sutter and Mr. Graber. And so by calculating and as a matter of long practice, as you can well imagine, you are not a Judge very long before you find lawyers on opposing sides of the case presenting to you diametrically opposed views of what passed between counsel. I am sure you are both familiar with that. And you learn as a Judge that when you have those direct conflicts between people who have ongoing responsibilities to the case before you, you just don't resolve them. You can't. Because you can't resolve an issue of credibility against one of the two lawyers in the case because they are both going to continue in the case. At this point you just sort of have a failure of proof on both sides.

Now, I think that what impresses me about Mr. Graber was that his command of his own mind, his own recollection, even in the -- to him, the specifically harrowing experiences of September 1, the late afternoon when he had been -- I think he felt truly put upon, that he had really been victimized by some ghastly mistake, and on the following morning he did present substantially everything that has been presented here except your criticism of what was said at the side bar.

Appendix B

Now, I do realize that Mr. Graber did not come up to the side bar. My own practice is never to exclude clients from side bars if they want to comeup. Ordinarily they come to the first one or two and not thereafter. They find them, as they usually are, rather dry discussions. There was no exclusion of Mr. Graber from the side bar discussions in the remotest respect. I agree, those points, those things would not have been said if there was Mr. Graber's presence at the side bar. But I can only say that the only way that anyone can ever attempt an evaluation of the effectof such things is by reference to what he did before his attention was drawn to them with particularity as you have in your motion papers today. There is the balance of the conduct of the trial and the memorandum and decision. And on those I have to rest I think. I can't say anything. I do not think they disclosed any animus against Mr. Graber.

Now, I don't much care for Mr. Sutter's style as a lawyer. And I am sure many do not. Now, that is not any subtraction from his eminence, but it's a question of style of practice and his -- which I do not like, and I should say it is fairly common among busy lawyers at the criminal Bar.

I thought that two things were being done with

respect to the defense of this case. One was to make sharp and clear the legal point first. And it was a twofold legal point. First, that the answers that Mr. Graber gave were not solid answers before the Grand Jury and could not as a matterof law be the foundation of a perjury indictment. Second, that as a -- the transcript shows he was distraught. He is a man of a certain quality of nervous disability which doesn't impair his usefulness as a worker or anything else, but perculiarly unfits him either to be a Grand Jury witness or a trial court defendant. And that appeared, to some extent, from the transcript of the Grand Jury proceedings and in all depths at the trial, at every occasion counsel pressed on the attention of the Court the man's mental frailty -- not a disabling frailty, but one peculiarly unfitting him to stand the rigors of testifying in Court, testifying before th e Grand Jury. So that by the time Mr. Graber took the witness stand, I was supposed to take from his testimony what was good and discount to nervousness what was bad. That was a -- the calculated part of this able lawyer's method of representing the defendant, that the seemingly derogatory remarks were attempted to doctrinate me to believe -- and I think that is reflected in these memoranda -- believe that he

was not equal to these legal cases.

Now, Ido not think that it was a happy relationship of representation. It is perfectly plain to me that Mr. Graber was acutely unhappy with it. And it was perfectly plain to me that Mr. Sutter was in one half of his mind unable to understand Mr. Graber's inability to appreciate the method of representation of Mr. Sutter that Mr. Sutter was using, and with the other side of his mind the determination to see to it that he had his way; that he managed the litigation for one simple reason, that he thought he knew more about managing litigation than Mr. Graber did. And perhaps he does. And we have to look at the witnesses who are -- as the testimony described, only an outline because as to some the affidavit says that they are not being stated in full. They rather relate to something which Mr. Sutter put into the record only as a background and by insinuation. And that is to -- which is what you might call the underlying charge such as the one to which Mr. Cosenza pleaded. It was far more relevant to that. And Mr. Sutter did not during the trial omit any opportunity -- and I think that, too, is reflected in the memorandum and makes it clear that Mr. Sutter wherever he could -- and many of the witnesses were still -- well, I don't want

to use the words, "many" -- witnesses were used to put into the record the idea that Mr. Graber had never threatened anybody, had never been forcible, had never in effect said, pay up or you're out of a job, or you won't get a promotion, or this, that or the next thing. That was brought out wherever he could. And wherever there is an opportunity to impeach the witness' testimony in a general way by showing a motive of some sort to testify against Mr. Graber, that was done.

And I think that within the four corners of the kind of trial that Mr. Sutter was determined to conduct and did conduct, he represented Mr. Graber very effectively.

Now, so far as the waiver of jury trial is concerned, I was somehwat surprised of Mr. Graber's continued willingness to waive the jury trial and more surprised that he didn't say, but before another Judge. I think the judgment was right because I think he has a lot of confidence that in his ability to persuade -- and I think he had persuaded me on September 1st and September 2nd to a sympathethic view of him as a man.

Interestingly, if you read the pre-sentence report, you will see what I mean. That's true. I mean he's fundamentally a sympathetic man. And you don't have to do any more than rush across the letters

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which have been sent in in support in connection with the pre-sentence proceedings to get some idea of the personal feeling that he is able to induce -- and I think with me.

(Continued next page)

THE COURT: (Continuing) Now, I do not think that he was ineffectively represented. I think that he kept believing throughout that it would have been better to call a lot of witnesses who would have, in effect, tried to change the atmosphere that arose out of the Government calling the selected witnesses that it did. Because it was no secret to me that out of, I think, literally, hundreds who had been interviewed -- and many more who had been interviewed in Mr. Graber's department than were called as witnesses, that the Government didn't have as many witnesses as there were people in Mr. Graber's department. Perfectly plain. But that, you see, would have been highly relevant to a different case. The case before me was this very much narrower case and one in which I think the principal objects of the trial had to be -- first, to see that the witnesses didn't overspeak, to get out of them what background support of decency and decorum could be obtained, to impeach credibility for what it was worth where it could be done, and most important, to -- if he was up to it -- and he was -- have Mr. Graber testify as to the circumstances of the Grand Jury testimony, his own background kind of person he was and his personal feelings with respect

to what went on in the Grand Jury room.

Now, that made a rational trial plan. I felt that the jury having been waived my responsibility was to treat the evidence fully and the bases of my decision fully.

Do you have a time problem?

MR. CAHN: No. It is all right.

THE COURT: So that if I was wrong in this case, an appeal wouldn't be a problem, but the dice wouldn't be loaded against the man and that every legal aspect of the case that I could visualize was exposed in the opinion, was the way I had resolved it made clear, so that in the event of an appeal, if I am dead wrong, there won't be any problem in reversing me. There never is. And it is in that context that I say that I do think it was wise to have made this motion because I do think that in the way in which you have presented it here and in your papers it does fit into the decision that I rendered, so that if there are defects in the -- with respect to those raised by Mr.Graber's motion, they can be immediately related to the decision in the case.

Now, however, I do not think that a case that had been made out for inadequate representation

-- I think that the main reason for thinking that is that the issue was solved, was so clearly and fully and in detail raised in advance of the trial, at the commencement of the trial, when the Government rested, and that each of those times a judgment was made, which I can't criticize from a legalistic point of view, although I am not really in any way in a position to do that, but which does not seem to me to be in any extent inadequate representation. I think that -- I don't know. I can't guess how other lawyers would have handled them. All I can guess is having been handled the way it was, it has been ---it has created this ripe opportunity for post-trial relief that may make the difference. I don't know. I don't think so. I think it should not. And for that reason I do deny the motion.

MR. CAHN: Thank you very much, your Honor. I respectfully except to your Honor's decision on the motion.

* * *

APPENDIX C

JUDGMENT OF THE UNITED STATES COURT OF APPEALS

United States Court of Appeals

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirty-first day of March one thousand nine hundred and seventy-seven.

Present: HON. J. EDWARD LUMBARD

HON. WALTER R. MANSFIELD

HON. MURRAY I, GURFEIN,

Circuit Judges,

United States of America, Plaintiff-Appellee v. Raymond Graber, Defendant-Appellant	77-1006

Appendix C

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

by
Arthur Heller
Deputy Clerk

Supreme Court, U. S.
FILED
MAY 7 1977
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1976

No. 76-1510

RAYMOND W. GRABER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX

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APPENDIX A — FINDINGS OF JUDGE DOOLING

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

RAYMOND GRABER,

Defendant.

75 CR 166

SPECIAL FINDINGS OF FACTS AND GENERAL FINDINGS

Appearances:

JOHN CADEN, Esq. (DAVID G. TRAGER, Esq., United States Attorney, of Counsel) for the Government

JOHN JOSEPH SUTTER, Esq. for the defendant

DOOLING, D.J.

In response to allegations of the existence of a corrupt political contribution system in Nassau County the United States Attorney for the Eastern District of New York initiated an investigation, and, in connection with the investigation, a Special Grand Jury was duly impanelled in January 1975 to conduct an inquiry into the charges of a corrupt political contribution system in Nassau County (Rule 6(a), (g), Federal Rules of Criminal Procedure). Specifically, the inquiry was directed to determining whether there was or was not prevalent in Nassau County public offices a system under which employees

Appendix A

were expected and required to pay 1% of their annual pay to committees of the Republican Party, whether such a system of contributions, if it existed, was voluntary or was brought about by coercion, and whether any violations of federal law were involved. The federal statutes in contemplation were the penal sections of the Civil Rights Act, 18 U.S.C. 241 and 242 and the Hobbs Act, 18 U.S.C. 1951 which, among other things, proscribes affecting commerce or the movement of any articles in commerce by extortion or conspiracy to do so. The investigation continued from January 1975 into the year 1976. In the course of it federal investigators conducted some 1500 interviews, from 300 to 400 witnesses were called in, and their testimony was presented to the Grand Jury.

Witnesses before the Grand Jury gave testimony which indicated that the Department of Conservation and Waterways of the Town of Hempstead was an office in which 1% contributions were given to the Republican Finance Committee of the Town of Hempstead; in that connection there was testimony that indicated that defendant was involved as a solicitor, collector or transmitter of 1% contributions. The defendant was accordingly subpoenaed to appear before the Grand Jury and did appear before the Grand Jury on July 11, 1975.

No substantive indictments have resulted from the Grand Jury investigation of the 1% system that was alleged to have prevailed in Nassau County public offices, but the progress of the investigation and of the Grand Jury inquiry was regularly reported to the Civil Rights Division of the Department of Justice in Washington and minutes of the Grand Jury proceedings were sent to Washington periodically for its consideration. The only indictments which have resulted from the Grand Jury investigation have been perjury indictments.

Appendix A

The defendant appeared before the January 1975 Special Grand Jury on July 11, 1975 at about 11:00 in the morning. A number of other persons had been subpoenaed to testify before the Grand Jury on the same morning and the defendant may well have derived from the circumstances an impression that the Assistant United States Attorney was pressed for time and that defendant would be expected to testify quickly.

The transcript of the Grand Jury testimony of the defendant is an accurate transcript of the questions asked of defendant and the answers he gave during his interrogation before the Grand Jury. The defendant was duly sworn by the foreman of the Grand Jury. The Assistant United States Attorney, after asking the defendant whether or not he was employed by the Town of Hempstead and ascertaining that he had for nearly two years been Deputy Commissioner of the Department of Conservation and Waterways, advised the defendant that the Grand Jury was looking into allegations that Town of Hempstead employees had been coerced into giving portions of their salaries each year to the Republican Party. He was advised further that there had been "a fair amount of testimony" about the defendant's participation in the one percent scheme.

The Assistant then advised the defendant that he had a right to refuse to answer any questions the answers to which might tend to incriminate him, that anything he did say could be used against him in court at a later time, that he had a right to have an attorney of his choice to consult with outside the Grand Jury room, that he could consult with that attorney at any time by simply asking the foreman, and, finally, that if he could not afford counsel the court would provide him one. The defendant asked whether this was a routine statement. The Assistant answered that it was not, that, "[i]n all candor, . . . if it is determined that there have been violations of the federal criminal statute, you might fit into the category as a defendant

rather than a witness in that there has been testimony that you have participated in the one percent thing as it is called; that you have actively solicited employees possibly pressured them and indeed, given them cards of some sort with one percent figures on them." (Tr. 3, lines 15 to 23). The Assistant explained that he did not say and it had not yet been determined whether or not such conduct was criminal but that he thought the defendant should know — and at that point the defendant interrupted. The defendant said that after Special Agent Walter Distler of the Federal Bureau of Investigation had telephoned him, he had telephoned to Republican Headquarters and confirmed that James Catterson was available as counsel.

Defendant then asked whether it was proper for Mr. Catterson to be in the jury room, saying

> "I mean you're putting it in a pretty grim light."

The Assistant United States Attorney explained that the law did not allow attorneys in the Grand Jury room but that at any point during the interrogation the witness could simply by asking go out and talk to his counsel privately. At that point the defendant stated that he did not think there would be any need for that, but

> ". . . what you just said is sort of scary."

The Assistant United States Attorney then pointed out that Mr. Catterson was outside, and that if defendant wanted to talk to him at once or any other time — but the defendant interrupted to say that he did not really think he wanted to.

Defendant was then asked whether he desired to waive his constitutional rights and to testify before the Grand Jury. Defendant answered that he would certainly testify and that no

threat or promise had been made by the Assistant United States Attorney or anyone else.

Defendant's testimony on the topic of inquiry occupies about 12 pages in the transcript (Tr. 5, line 14 to Tr. 16, line 9). He was first asked whether he had heard anything to the effect that the Town employees were expected to give one percent of their salaries to the Republican Party each year. He answered

> "No other than in the newspapers for many years. . . . Through the years, the various officials of the Party have openly admitted; its appeared in newspapers through the years, that many well, in our case since I think you can encompass more in the Town of Hempstead that many of the Town of Hempstead employees contribute and a figure is made in many cases about one percent."

His answer was somewhat further extended and he was then asked —

> "Q Did you hear anything to the effect that Town of Hempstead employees are expected to give one percent?
>
> A No. All I know is that I read in the paper. Specifically, nobody ever told me at any point that I must give one percent."

Defendant's attention was drawn to the fact that his 1974 salary was recorded as $20,159 and that his Party contribution around election time was $202. He was then asked how he had arrived at that figure. After some further questioning about the

amount of the salary and of the contribution the witness was again asked, "How did you arrive at the $202 figure?" And he said —

> "Okay, I would pinpoint it this way. As I previously stated, I joined the Town of Hempstead in late September of 1966. At that time, my department was in its inception. It was just a nucleus being formed. It was a new and imaginative, way ahead of its time concept in environmental protection."

At that point the Assistant United States Attorney interrupted the witness and said —

> "As you can see, I'm obliging you at your request here, as you can see. There's a hallway full of people out there that we are trying to get out of here by lunchtime. And if we can stick to the question, we'll be a lot better off."

The Assistant then returned to the questioning and said

> "Q You sat down in 1974 and you made out a check for $202.
>
> A Right. Good. You asked me —
>
> Q How did you arrive at this figure?
>
> A Perhaps I've been too wordy but I tried to explain it. In any event in mid-October at that time having a small office, you know, just several people, I heard *Yolanda* Rider Speranza. . . , Carl Lebek — . . . Thomas Laurencelle . . . And Gino Aiello. . . . They were all sitting around in a bull session discussing the fact that they received, I believe, a campaign finance letter and that they were all going to contribute one percent. One of the four, I do not recall which of the four, said to me 'you ought to contribute one percent too.'
>
> "Q What year was this?
>
> A This was 1966.

The defendant explained that in that year, having been unemployed for a year before he hired on, he had made only a token contribution but that in the ensuing years he had made a one percent contribution "just like every body else."

Defendant was then asked the first of the questions quoted in the indictment (Tr. 9, line 7).

> "Q All right. Now, did you play any role within your department in actively soliciting these contributions from employees under you at any time?"

The defendant's answer in substance was that he acted in each and every year after 1966 as the transmitter of contributions, but would not have been so presumptuous as to say to anyone "you should give one percent." He said, indeed, that when his secretary asked him what everyone was talking about with reference to one percent, he told her that she would have "to get that information from somebody else." He continued —

> "In other words, feeling in my position, that I should not be the originator of such a thing."

The Assistant United States Attorney then said,

> "Q All right. Let me ask you this then.
>
> A Incidentally I do not wish to commit perjury. There is a little more to that.
>
> Q All right. Hold on.
>
> A I don't want to commit perjury."

The Assistant United States Attorney then asked the second question quoted in the indictment —

> "Q A number of employees have testified that you would come around and give them a three-by-five or a similar card on which it would have their name, their salary, and a handwritten notation somewhere on the card which was a figure representing one percent of their salary. Now, first of all, has that occurred?"

The defendant answered that cards showing the employees' names and salaries were indeed prepared, but the substance of his testimony was that this was done as a convenience to employees who wanted to know what their salaries were so that they, acting on their own initiative, could figure one percent on their salary. Speaking of department employees who were not in the main office where defendant was stationed but at scattered locations, the defendant said "I rarely see them. I have no direct communication with them. I have never solicited them. Okay?" He explained that at times he gave such 3 x 5 cards as were referred to in the question to supervisors for distribution to the men working under their direction at locations outside the main

office. He said in this connection that he had received so many requests for salary data that

> ". . . I did give some to some supervisors with these instructions, so help me God! 'You have this. You've been asking for it for some. There's gonna be more. I'm too busy preparing a budget. They are only to be given to a man if he asks you a question which specifically can be answered by you.' And there was no one percent figure on those cards."

The indictment charged that the quoted testimony of the defendant, as he then well knew and believed, was not true in that

> ". . . he had suggested to Town of Hempstead employees that they should give a portion of their annual salaries to the Republican Finance Committee, and he had approached Town employees to solicit such contributions."

The Government's evidence at the trial established beyond a reasonable doubt that the defendant both had solicited, on behalf of the Town of Hempstead Republican Finance Committee, contributions equal to one percent of annual compensation and had suggested to Town of Hempstead employees that they give one percent of their annual compensation to the Republican Finance Committee of the Town of Hempstead. The evidence of the witnesses was that in August or September of each recent year before 1975 the defendant would remind them that one percent time was at hand, and that he would do this without being asked by employees whether or not they were expected to contribute or

whether or not it was time to make a contribution to the Republican Finance Committee.

The defendant, in the case of employees within the headquarters office of the department, personally approached employees and received checks from them. In the case of employees not working in the main office or headquarters, defendant would advise their respective supervisors that it was time for the employees under their supervision to be reminded that it was the time of year to make a one percent contribution. Defendant supplied to the supervisory employees lists of the employees in their locations with their annual salaries, and the evidence was that departmental employees in places outside the main office who failed to make contributions, or who had some reason for not being able to do so, were told to take the matter up with defendant.

The evidence was, and it is credible, that defendant did cause cards to be prepared for the departmental employees, each card showing the name of the employee and his annual salary, and that the cards in at least one year also had the one percent amount computed on the card. There was no evidence that the supervisory employees or any other employees had taken the initiative and had themselves asked defendant either for lists or for cards in order to serve as a convenience to those who might not recall the exact amount of their compensation (inclusive of overtime).

There was considerable credible evidence that defendant did not advise certain employees that contribution was mandatory, or say to them that a failure to contribute could affect either their hiring by the Town, their promotion, their receiving overtime, or any other expectable employment advantage that discretionary authority could deny to them. However, there was also credible

evidence that defendant told one employee who had failed to make a contribution that he would not receive overtime because of his failure to make a contribution. The employee in question took the matter up with defendant's superior, Commissioner Udell, who cancelled the prohibition of overtime; it appears that the employee lost not more than one Saturday morning's overtime. There was credible evidence also that defendant gave another employee to understand that if he wished to be reclassified to a certain advantageous compensation basis he would be expected to make a contribution. The employee then tendered a $75 money order to defendant which defendant first rejected but later accepted. After a considerable lapse of time the employee did receive the desired classification. When "one percent time" arrived later in the same year the employee contributed, in addition to the $75 already contributed, approximately one percent of his annual pay.

The evidence supports beyond a reasonable doubt the inference that defendant did advise employees to make contributions equal to one percent of their annual salary rounded to the nearest full dollar. In the case of one employee who had been solicited through her supervisor to make a one percent contribution, the employee, opposed to being expected to make any contribution at all, drew a check in an amount equal to exactly one percent of her annual salary — $81.67. After a lapse of two weeks defendant returned the check to her and told her to write a new check rounding the amount off; thereupon the employee did write and give to the defendant an $82 check.

The evidence in the case thus leaves no escape from the conclusion that the defendant was an active participant in the solicitation of one percent contributions from Town employees and in suggesting to them that their contributions should be a

portion, that is, one percent, of their annual compensation. The solicitation and suggestion was made directly to main office employees, and was made indirectly, through supervisors, to employees at locations outside the main or headquarters office.

Defendant contends that he was not given an opportunity to complete his answers but was hurried and interrupted before he had completed his answers to the questions quoted in the indictment. He contends that the answers that he gave are, upon analysis, seen to be so unresponsive and inexact that they could not form the basis of an indictment under 18 U.S.C. 1623 in the light of *Bronston* v. *United States*, 1973, 409 U.S. 352.

The circumstances of defendant's testifying before the Grand Jury bear directly on this question.

On June 11, 1975, one month before defendant testified before the Grand Jury he was interviewed by Special Agent Walter E. Distler of the Federal Bureau of Investigation. Mr. Distler credibly testified as follows:

> "Q Can you recall what if anything you and Mr. Graber discussed concerning employee contributions within his department?
>
> A Yes, I asked him if he knew anything about the one percent. He indicated that he did and I believe he said he heard about it through scuttlebut from employees in the office.
>
> He further indicated to me that when he first became employed with the Department of Conservation and Waterways he was requested by the Commissioner to act as a collector for any

> contributions that might be given by employees of that department.
>
> Q Did you ask him whether or not he had anything to do with the soliciting of those contributions?
>
> A Yes, I believe he did.
>
> Q What if anything did Mr. Graber say?
>
> A Mr. Graber said he had nothing to do with the soliciting of the contributions, but then he indicated to me that he did act as a collecting point for the contributions.
>
> Q Did you ask Mr. Graber whether or not he had ever solicited contributions for the Republican Party?
>
> A Yes, I believe I did and he indicated to me that as a member of the West Hempstead Republic Club which he said was a social organization he did on possibly one or two occasions go door to door soliciting contributions for the Republican Party.
>
> Q Did you ask him after he said that or did it ever come up whether or not he had ever solicited contributions from employees of the Town of Hempstead?
>
> A Yes, I think he ended that by saying that he never solicited contributions from the employees of the Town of Hempstead."

Appendix A

On cross-examination he was asked and answered the following questions:

> "Q When you get into this word "soliciting," what did you intend by that word?
>
> A Did he actually go to various employees and ask for contributions.
>
> Q He told you "No"?
>
> A That's right.
>
> Q Mr. Distler, he did tell you, though, did he not, that he would have other people that were employed by the Town go out and ask for contributions?
>
> A Not to my knowledge he didn't.
>
> Q Did you ask him if he did?
>
> A No, I did not."

Later in his cross-examination Mr. Distler testified:

> "In your interview, did you ever ask Mr. Graber whether or not he suggested to Town of Hempstead employees that they should give a portion of their annual salaries to the Republican Finance Committee?
>
> A No.

Appendix A

> Q Did you ever in your interview with Mr. Graber ask him whether or not he had approached Town employees to solicit such contributions?
>
> A No, I didn't."

In the context of the last two questions and answers the witness's answers appears to be directed to the precise verbs used — "suggested" and "approached." The witness's answers were not intended to withdraw the substance of what he had said in his direct testimony quoted above.

Defendant himself testified about his interview with Mr. Distler and the central point of his testimony was that Mr. Distler had not asked him whether he "solicited" contributions but had only asked him whether or not he had "collected" contributions. Defendant said in part

> "A The only word he used was "collect." I remember that. "Did you collect" and in order to answer him I had to define it. I said, "Mr. Disler, can you define what you mean by that? Do you mean if I actually solicited donations from individuals in my department, like one would if he went from doorbell to doorbell to doorbell in his neighborhood," meaning to each and every or virtually each and every person. Mr. Disler says "Yes, that's what I mean," and of course to that type of solicitation the answer is no and this is what I so told Mr. Disler, to that type of each and every or virtually each and every person like you do when you go down the block ringing doorbells. I have this "doorbells" and it's also in

my second discussion with Mr. Disler via telephone because then we have a somewhat different version on the second — when he called me and said that unlike the other departments —

Q I must ask you —

A I'll stop there. Okay.

In that frame of reference, my answer, after I got Mr. Disler to qualify what he meant by collect, the answer was then no.

Q You admitted to Agent Disler then that you in fact did solicit employees, co-employees, but not directly?

MR. SUTTER: Objection.

THE COURT: On what ground?

MR. SUTTER: On the basis —

THE COURT: You're arguing with him because of the word "then" in the question?

MR. SUTTER: Not only that, your Honor, but that's not the testimony of this witness.

THE COURT: I'll sustain the objection to the form of the question.

MR. SUTTER: Thank you, sir.

Q Did you tell Agent Disler that you solicited employee contributions?

A He never asked me.

Q Never asked you?

A Other than what he said, "Do you collect," I asked for a definition. By definition, going down the block, doorbell by doorbell. He said, "Yes, that's what I mean." I said, "The answer is no," and then his next question — I may have the order wrong, you know. I don't know which order, but my notes "When you're hired by the Department of Conservation Waterways, did Francis D. Purcell tell you about one percent?" I said unequivocally, "No."

Shown Special Agent Distler's memorandum of the June 11th interview (dictated from his now destroyed notes by Mr. Distler on June 17th, six days after the interview), defendant in substance said that the memorandum did not refresh his recollection of the conference and that he disputed its correctness. He then was asked and answered:

> "Q What you dispute is you being attributed as having said during the course of that interview that you had absolutely nothing to do with soliciting these contributions and that you had merely acted as a collecting point for any contribution employees may desire to give. Is that what you dispute you didn't say that?
>
> A Either soliciting or collecting, either."

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The witness had his own "debriefing" notes of the interview which he had made on the day of the interview, and when he was asked whether another part of Mr. Distler's memorandum refreshed his recollection he referred to his own debriefing note and then answered:

> "A This was written the same time. I have no recollection of that time nor the debriefing which I made immediately of the word "solicitation" ever being used or anything other than that —
>
> • • •
>
> Q You do not recall repeating to him a second time during the course of the interview that you had never solicited contributions from employees of the Town of Hempstead?
>
> A I say on the first interview he didn't ask me that."

Defendant was amply forwarned of the questions which he was likely to be asked when he appeared before the Grand Jury. There is no real disparity between what he said to Mr. Distler and his Grand Jury testimony. Nor is there any significant disparity between his reconstruction at trial of discussion of the Distler interview and the approach to the subject of the so-called one percent system which he took in testifying before the Grand Jury.

Defendant testified that he had heard of the United States Attorney's investigation early in the year and had talked about it with his superior, Commissioner Udell, before going into the Grand Jury. He further testified that Commissioner Udell had told defendant that Udell could not get himself involved, that

Appendix A

the Commissioner could not admit that he had assigned the defendant to the matter each year and that Udell told the defendant in essence that he would be on his own. Defendant testified that Commissioner Udell had not wanted the defendant to refresh his (Udell's) recollection, that on the contrary, Udell wanted to cut off his talk with defendant altogether. Defendant said that this preyed on his mind. He was also concerned about what Commissioner Udell had said about Yolanda Speranza, Udell's secretary — or what a Gino Aiello had said — to the general effect that defendant had twisted Yolanda Speranza's arm. He was concerned also about Udell's statement that one John Zuretsky "could hang us all." Defendant had earlier heard that before he (defendant) had been employed by the Town of Hempstead, Zuretsky had been denied a promotion because he had not made a contribution. Apparently at some point Commissioner Udell had allegedly designated defendant to remind Zuretsky to make contributions in future years. Defendant testified that when he was told in the Grand Jury that he was potentially a defendant he had an impression that all of this was connected with Commissioner Udell's intrigue and the Commissioner's own earlier appearance before the Grand Jury.

Defendant testified that he had consulted with Mr. Catterson before testifying, and that Catterson had tried to give him an insight into Grand Jury functions and how to answer questions and had spotted a couple of things for him. Defendant said that Mr. Catterson had told him that it would be good to include in his testimony something in praise of his department. Defendant told the Grand Jury, referring to the year 1966,

> "At that time, my department was in its inception. It was just a nucleus being formed. It was a new and imaginative, way ahead of its time concept in environmental protection."

Defendant said that Mr. Catterson had also told him that before he explained something he should use an expression "I don't want to be hairy about this." Before the Grand Jury defendant did say in answer to the solicitation question: "I don't want to be hairy about it."

Defendant testified that he was treated roughly in the Grand Jury room, that he was questioned in an accusatory manner, and that he was not permitted to complete certain of his answers. Defendant said that he got in touch with the United States Attorney's office right after he had testified and advised them that he felt that his testimony was incomplete because he was rushed, and he asked to have the Assistant United States Attorney recall him as a witness. He later consulted Mr. Catterson, who, he testified, told him that he had a problem with the United States Attorney's office and should go to see them. He went then to the FBI and an FBI man took him in to see the Assistant United States Attorney. The Assistant United States Attorney suggested to defendant that he retain an attorney and return. Defendant did retain an attorney and returned with him to see the Assistant United States Attorney. Defendant's attorney went over the Grand Jury testimony, and in the end, after the Assistant United States Attorney had suggested that defendant go into the Grand Jury again, defendant's attorney advised the Assistant United States Attorney in defendant's presence that he did not see perjury in the transcript and therefore was advising the defendant not to go back on the witness stand. Defendant accepted that advice.

At the trial defendant was asked on cross-examination, with reference to the visit to the Assistant United States Attorney, which took place on August 8, 1975, whether he had not stated to the Assistant that the testimony he had previously furnished to the Grand Jury on July 11, 1975, was true and correct. The

defendant was unable to answer that question from his recollection but answered

> "Seeing my Grand Jury notes, I would say my Grand Jury notes are true, my Grand Jury testimony is true."

On re-direct examination the defendant in substance testified that he did tell supervisors to go about and see if they could get political contributions for the Republican Party, that he solicited many people for contributions and that he did this at the direction of the Commissioner.

Taking into account all of the evidence both relating to the period before his Grand Jury testimony and after it, as well as defendant's testimony at the trial, it is concluded that the defendant was not prevented from continuing his testimony before the Grand Jury in any manner that was improper or that resulted in the defendant's failing to convey his complete response to the questions asked. While the answers that he gave were discursive in the extreme, they dealt directly with the questions asked. In each case the answers produced, and were intended to produce, the impression that the defendant was not active in the solicitation of one percent contributions from employees of the Town of Hempstead, but was merely one who stood passively ready to transmit contributions voluntarily offered to him for transmittal to either Commissioner Udell or to the Republican Finance Committee of the Town of Hempstead. So far as the furnishing of cards was concerned, defendant's position was made perfectly clear and was completely described; he testified before the Grand Jury that he did not prepare cards as an integral part of the system of soliciting campaign contributions, but, rather, had cards prepared in response only to requests for salary data addressed to him and as a convenience to those employees who either

directly or through their supervisors sought, or were expected to seek, information about their salaries, so that they could better compute their voluntary one percent contributions. The defendant has not indicated either during trial or at or after he testified before the Grand Jury what additional testimony he had intended to proffer to the Grand Jury, and how it would have modified the effect of the testimony that he did give.

The suggestion has been that *Bronston* requires an inquiring attorney to pursue an evasive witness until his answer is explicitly responsive to the question asked. The defect of the questioning in *Bronston* was that the witness had very plainly not answered the second question in the sequence; he had answered a question that had not been asked, and the volunteered statement did not imply a response directed to the substance of the question asked. The first question had been whether Bronston had any bank accounts in Swiss banks at the time he was being questioned; he answered "No." The next question was "Have you ever had any Swiss bank accounts?" His answer was that his company had maintained such an account there for about six months, in Zurich. He then was asked whether any of his nominees either currently had or had ever had Swiss accounts and he answered "No." In fact Bronston had maintained a Swiss bank account which may well have continued in existence up to a date relevant to the inquiry. In *Bronston* the second answer did not amount to saying, "No, I never had such an account, but my company did." It was consistent with an answer, "Yes, both I and even my company have had accounts in Switzerland." Hence the Court concluded that the answer could not be the foundation for a charge of perjury, saying (409 U.S. at 362)

> "... we are constrained to agree with Judge Lumbard, who dissented from the judgment of the Court of Appeals, that any special problems

> arising from the literally true but unresponsive answer are to be remedied through the 'questioner's acuity' and not by a federal perjury prosecution."

In the present case, in contrast, the defendant's answers, while discursive and circumstantial, were precisely responsive. They depicted his role; they conveyed very complete answers to the questions asked. The answers he gave could not have been deprived of their content as responsive and untrue by any words that the defendant could have added to them short of total and explicit recantation before the Grand Jury of the substance of the answers given.

Defendant gave evidence that as a result of his military service he had a service-connected disability affecting his mental condition, and it could be inferred from his courtroom performance that he is what is thought of as temperamentally high strung. However, neither the text of his Grand Jury testimony, nor his statements and testimony in court, afford ground for inferring that he failed in self-possession either before the Grand Jury or in court. The inference is that in each place he was able to say what he intended to say.

GENERAL FINDING

It is found that the defendant is guilty as charged.

Dated: Brooklyn, New York
October 1976.

U. S. D. J.

APPENDIX B — ORAL OPINION OF THE DISTRICT COURT

[Tr. pp. 57-66 (12/10/76)]

THE COURT: Well, I think it was wise and good to have made the motion and to have made it in this detail in which it has been made because I think that the questions raised are real and substantial, notwithstanding that I do think that a — first, that a hearing is unnecessary because the issues of fact are not — are not very real; and second, because I think that the papers on their face make out a total case which fails to meet the required standard.

Now, I quite agree with you that the mockery of justice standard of presentation is a standard — the days of which are numbered even in our Circuit, though they are still given a certain amount of lip service. The standard used in the 6th and 9th Circuit seem to be a good deal healthier. I am not sure that the standards used in the District of Columbia or the Court of Appeals will ever be adopted. That would seem to require that in every case the Government proved its case twice, which is a little too much.

I think my first reaction to the situation between Mr. Sutter and Mr. Graber was, of course, produced — formed and colored by what I heard from Mr. Sutter and Mr. Caden and by — Mr. Caden's contributions, of course, came to him from Mr. Sutter because he was not directly in touch with Mr. Graber during these times. I think, however, that from the time when Mr. Graber was arrested and brought into Court, I had a total suspension of judgment of who was telling the truth as between Mr. Sutter and Mr. Graber. And so by calculating and as a matter of long practice, as you can well imagine, you are not a Judge very long before you find lawyers on opposing sides of the case presenting to you diametrically opposed views of what passed between counsel. I am sure you are both familiar with

that. And you learn as a Judge that when you have those direct conflicts between people who have ongoing responsibilities to the case before you, you just don't resolve them. You can't. Because you can't resolve an issue of credibility against one of the two lawyers in the case because they are both going to continue in the case. At this point you just sort of have a failure of proof on both sides.

Now, I think that what impresses me about Mr. Graber was that his command of his own mind, his own recollection, even in the — to him, the specifically harrowing experiences of September 1, the late afternoon when he had been — I think he felt truly put upon, that he had really been victimized by some ghastly mistake, and on the following morning he did present substantially everything that has been presented here except your criticism of what was said at the side bar.

Now, I do realize that Mr. Graber did not come up to the side bar. My own practice is never to exclude clients from side bars if they want to comeup. Ordinarily they come to the first one or two and not thereafter. They find them, as they usually are, rather dry discussions. There was no exclusion of Mr. Graber from the side bar discussions in the remotest respect. I agree, those points, those things would not have been said if there was Mr. Graber's presence at the side bar. But I can only say that the only way that anyone can ever attempt an evaluation of the effect of such things is by reference to what he did before his attention was drawn to them with particularity as you have in your motion papers today. There is the balance of the conduct of the trial and the memorandum and decision. And on those I have to rest I think. I can't say anything. I do not think they disclosed any animus against Mr. Graber.

Now, I don't much care for Mr. Sutter's style as a lawyer. And I am sure many do not. Now, that is not any subtraction

from his eminence, but it's a question of style of practice and his — which I do not like, and I should say it is fairly common among busy lawyers at the criminal Bar.

I thought that two things were being done with respect to the defense of this case. One was to make sharp and clear the legal point first. And it was a twofold legal point. First, that the answers that Mr. Graber gave were not solid answers before the Grand Jury and could not as a matterof law be the foundation of a perjury indictment. Second, that as a — the transcript shows he was distraught. He is a man of a certain quality of nervous disability which doesn't impair his usefulness as a worker or anything else, but peculiarly unfits him either to be a Grand Jury witness or a trial court defendant. And that appeared, to some extent, from the transcript of the Grand Jury proceedings and in all depths at the trial, at every occasion counsel pressed on the attention of the Court the man's mental frailty — not a disabling frailty, but one peculiarly unfitting him to stand the rigors of testifying in Court, testifying before the Grand Jury. So that by the time Mr. Graber took the witness stand, I was supposed to take from his testimony what was good and discount to nervousness what was bad. That was a — the calculated part of this able lawyer's method of representing the defendant, that the seemingly derogatory remarks were attempted to doctrinate me to believe — and I think that is reflected in these memoranda — believe that he was not equal to these legal cases.

Now, I do not think that it was a happy relationship of representation. It is perfectly plain to me that Mr. Graber was acutely unhappy with it. And it was perfectly plain to me that Mr. Sutter was in one half of his mind unable to understand Mr. Graber's inability to appreciate the method of representation of Mr. Sutter that Mr. Sutter was using, and with the other side of his mind the determination to see to it that he had his way; that

he managed the litigation for one simple reason, that he thought he knew more about managing litigation than Mr. Graber did. And perhaps he does. And we have to look at the witnesses who are — as the testimony described, only an outline because as to some the affidavit says that they are not being stated in full. They rather relate to something which Mr. Sutter put into the record only as a background and by insinuation. And that is to — which is what you might call the underlying charge such as the one to which Mr. Cosenza pleaded. It was far more relevant to that. And Mr. Sutter did not during the trial omit any opportunity — and I think that, too, is reflected in the memorandum and makes it clear that Mr. Sutter wherever he could — and many of the witnesses were still — well, I don't want to use the words, "many" — witnesses were used to put into the record the idea that Mr. Graber had never threatened anybody, had never been forcible, had never in effect said, pay up or you're out of a job, or you won't get a promotion, or this, that or the next thing. That was brought out wherever he could. And wherever there is an opportunity to impeach the witness' testimony in a general way by showing a motive of some sort to testify against Mr. Graber, that was done.

And I think that within the four corners of the kind of trial that Mr. Sutter was determined to conduct and did conduct, he represented Mr. Graber very effectively.

Now, so far as the waiver of jury trial is concerned, I was somewhat surprised of Mr. Graber's continued willingness to waive the jury trial and more surprised that he didn't say, but before another Judge. I think the judgment was right because I think he has a lot of confidence that in his ability to persuade — and I think he had persuaded me on September 1st and September 2nd to a sympathetic view of him as a man.

Interestingly, if you read the pre-sentence report, you will

see what I mean. That's true. I mean he's fundamentally a sympathetic man. And you don't have to do any more than rush across the letters which have been sent in in support in connection with the pre-sentence proceedings to get some idea of the personal feeling that he is able to induce — and I think with me.

THE COURT: Now, I do not think that he was ineffectively represented. I think that he kept believing throughout that it would have been better to call a lot of witnesses who would have, in effect, tried to change the atmosphere that arose out of the Government calling the selected witnesses that it did. Because it was no secret to me that out of, I think, literally, hundreds who had been interviewed — and many more who had been interviewed in Mr. Graber's department than were called as witnesses, that the Government didn't have as many witnesses as there were people in Mr. Graber's department. Perfectly plain. But that, you see, would have been highly relevant to a different case. The case before me was this very much narrower case and one in which I think the principal objects of the trial had to be — first, to see that the witnesses didn't overspeak, to get out of them what background support of decency and decorum could be obtained, to impeach credibility for what it was worth where it could be done, and most important, to — if he was up to it — and he was — have Mr. Graber testify as to the circumstances of the Grand Jury testimony, his own background kind of person he was and his personal feelings with respect to what went on in the Grand Jury room.

Now, that made a rational trial plan. I felt that the jury having been waived my responsibility was to treat the evidence fully and the bases of my decision fully.

Do you have a time problem?

MR. CAHN: No. It is all right.

THE COURT: So that if I was wrong in this case, an appeal wouldn't be a problem, but the dice wouldn't be loaded against the man and that every legal aspect of the case that I could visualize was exposed in the opinion, was the way I had resolved it made clear, so that in the event of an appeal, if I am dead wrong, there won't be any problem in reversing me. There never is. And it is in that context that I say that I do think it was wise to have made this motion because I do think that in the way in which you have presented it here and in your papers it does fit into the decision that I rendered, so that if there are defects in the — with respect to those raised by Mr. Graber's motion, they can be immediately related to the decision in the case.

Now, however, I do not think that a case that had been made out for inadequate representation — I think that the main reason for thinking that is that the issue was solved, was so clearly and fully and in detail raised in advance of the trial, at the commencement of the trial, when the Government rested, and that each of those times a judgment was made, which I can't criticize from a legalistic point of view, although I am not really in any way in a position to do that, but which does not seem to me to be in any extent inadequate representation. I think that — I don't know. I can't guess how other lawyers would have handled them. All I can guess is having been handled the way it was, it has been — it has created this ripe opportunity for post-trial relief that may make the difference. I don't know. I don't think so. I think it should not. And for that reason I do deny the motion.

MR. CAHN: Thank you very much, your Honor. I respectfully except to your Honor's decision on the motion.

• • •

APPENDIX C — JUDGMENT OF THE UNITED STATES COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirty-first day of March one thousand nine hundred and seventy-seven.

Present:

HON. J. EDWARD LUMBARD

HON. WALTER R. MANSFIELD

HON. MURRAY I. GURFEIN,

Circuit Judges,

United States of America,

Plaintiff-Appellee

v.

Raymond Graber,

Defendant-Appellant

77-1006

Appeal from the United States District Court for the Eastern District of New York.

Appendix C

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

by

Arthur Heller
Deputy Clerk

FILED
JUL 12 1977
MICHAEL RODAK, JR., CLERK

No. 76-1510

In the Supreme Court of the United States

OCTOBER TERM, 1977

RAYMOND W. GRABER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The court of appeals affirmed without opinion (Pet. App. C). The opinions of the district court (Pet. Apps. A and B) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 31, 1977. The petition for a writ of certiorari was filed on April 30, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner received effective assistance of counsel at trial.

2. Whether petitioner knowingly and voluntarily waived his right to a trial by jury.

3. Whether petitioner's answers to questions before the grand jury were literally true (although unresponsive) and thus not perjurious as a matter of law.

STATEMENT

Following a jury-waived trial in the United States District Court for the Eastern District of New York, petitioner was convicted of perjury before a federal grand jury, in violation of 18 U.S.C. 1623. Imposition of sentence of imprisonment was suspended, and he was placed on probation for three years and fined $1,000. The court of appeals affirmed (Pet. App. C).

1. In January 1975, a grand jury in the Eastern District of New York commenced an investigation of possible violations of 18 U.S.C. 241 and 242 (Civil Rights Act) and 18 U.S.C. 1951 (Hobbs Act) in Hempstead (Nassau County), New York. Among the subjects the grand jury investigated were whether local government employees in Hempstead, Long Island, were expected to contribute one percent of their annual wages to the town's Republican Finance Committee, and if so, whether such contributions were voluntarily made. During the course of its investigation, the grand jury questioned over 300 employees, including some from the Department of Conservation and Waterways. Petitioner, formerly the Administrative Assistant and later the Deputy Commissioner of that Department, was questioned by the grand jury in order to determine whether he solicited and collected one percent contributions from fellow employees (Pet. App. 1a-2a).

Petitioner appeared before the grand jury on July 11, 1975. Prior to this appearance, petitioner was advised of his privilege against compulsory self-incrimination and informed by government counsel of the scope of the grand jury investigation, of the general nature

of the prior testimony of his employees and of the fact that he was a potential target of the grand jury's investigation and could be indicted (Tr. 70, 72-74; see Pet. App. 3a-4a). Petitioner then testified that all he knew about the "one percent system" was what he read in the newspapers (Pet. App. 5a). As the district court found (Pet. App. 7a), petitioner stated in substance "that he acted in each and every year after 1966 as the transmitter of contributions, but would not have been so presumptuous as to say to anyone 'you should give one percent.' "[1]

2. The evidence at trial showed that, contrary to petitioner's disclaimers before the grand jury, every year from 1968 through 1974 he actively solicited and collected one percent contributions from his employees (Tr. 116-120, 141, 144-145, 173-177, 363-371) and instructed supervisory personnel to do the same (Tr. 190-191). Employees who failed to make their contribution were told to see petitioner (Tr. 249). Petitioner, on his own initiative, prepared cards to solicit and collect the contributions (Tr. 193-195, 204, 212, 226, 248, 316). In 1973 the lists and cards prepared and distributed by petitioner contained figures representing one percent of the annual salaries of each of the employees (Tr. 229, 287-289, 345, 348).

The evidence further showed that petitioner attempted to institute a policy whereby any employee who did not make a contribution would not receive overtime (Tr. 190-191), that he instructed a supervisor to remove an employee from overtime because of his failure to contribute (Tr. 313-315), and that he told an employee that if he wanted

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[1]The precise questions and answers are set forth at pp. 10-12, *infra*.

a better job, he would be expected to pay his one percent (Tr. 366, 369-370).[2]

ARGUMENT

1. Petitioner contends (Pet. 9-16) that his retained counsel's performance in the trial of this case constituted a denial of his right to effective assistance of counsel. There is, as petitioner notes (Pet. 9-10), an apparent divergence of views among the circuits as to the proper standard for testing such claims. Several circuits recently have rejected the traditional "farce and mockery" test (*e.g.*, *Beasley* v. *United States*, 491 F. 2d 687 (C.A. 6); *United States* v. *De Coster*, 487 F. 2d 1197 (C.A. D.C.); *West* v. *Louisiana*, 478 F. 2d 1026 (C.A. 5), vacated in part and remanded, 510 F. 2d 363; cf. *United States* v. *Yanisfsky*, 500 F. 2d 1327, 1333, n. 2 (C.A. 2)) and in its stead have adopted a standard of "reasonableness" that they consider to be less stringent. But even if the existing difference among the circuits otherwise constitutes a significant conflict concerning the constitutional minimum, petitioner's representation at trial was competent and constitutionally adequate under any of the standards. Cf. *Dunker* v. *Vinzant*, 505 F. 2d 503 (C.A. 1), certiorari denied, 421 U.S. 1003. As the district court found after a thorough review of the issue (Pet. App. 27a), petitioner's counsel represented him "very effectively." Since counsel's performance in this case was well "within the range of competence demanded of attorneys in criminal cases" (*McMann* v. *Richardson*, 397 U.S. 759, 771), this case presents no occasion for the resolution of differences that may exist in the general standards enunciated by the courts of appeals.

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[2]After the employee made the contribution he received a better job (Tr. 363-371).

a. In particular, contrary to petitioner's assertions (Pet. 11-14), the fact that petitioner's counsel also represented three other individuals who were separately tried for their own perjury did not raise a substantial possibility of a conflict of interest before trial or cause an actual conflict during trial. At petitioner's arraignment the court asked his counsel if it was "utterly safe" for him to represent all four defendants (A. 9a, 12a-13a).[3] Petitioner's counsel responded that he saw "no conflict whatsoever" inasmuch as the individuals were not being tried together, did not work with each other, and individually chose him to represent them (*ibid.*).

It is true that petitioner's counsel later wrote a letter to the court in which he stated that "it is patent that there is a real possibility that there is a conflict of interest" and that he was making arrangements for separate counsel to represent petitioner and two other defendants (A. 15a-16a). But this claim was never elaborated or pursued by petitioner's counsel, and on this record it is difficult to envisage an actual conflict. Petitioner was tried for his own perjury. He was tried alone and was not charged with being a party with others in a criminal venture. There was no question of ascribing more blame to him than to others, and petitioner has failed to suggest any concrete way in which the alleged conflict prevented his counsel from representing him vigorously and without reservation. Petitioner's argument in this regard thus rests upon unfounded speculation and affords no basis for holding that the district court should *sua sponte* have precluded petitioner's retained counsel from representing him.[4]

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[3]"A." refers to petitioner's appendix in the court of appeals.

[4]This case therefore is not comparable to *Holloway* v. *Arkansas*, No. 76-5856, certiorari granted, April 18, 1977, upon which petitioner relies. In *Holloway*, in sharp contrast to this case, three defendants being

b. Petitioner contends further (Pet. 4) that his counsel met with him too infrequently and that they were unable to work together. Of course, counsel's actual performance at trial, and not the extent of contact between counsel and client prior to trial, is the proper measure of counsel's effectiveness. See *Wojtowicz* v. *United States*, 550 F. 2d 786 (C.A. 2). The record shows, in any event, that prior to trial defense counsel met with petitioner on three occasions and that a paralegal assistant to defense counsel met with petitioner several times (A. 86a). Petitioner's counsel also conferred with petitioner for an additional 15 hours between September 8 and September 13 to prepare him to testify (Tr. 458).

There apparently were differences of opinion between petitioner and his counsel prior to trial, but these were resolved before the trial began and did not impair the effectiveness of counsel's representation. The record shows plainly that petitioner and counsel formed an attorney-client relationship and conferred continuously throughout trial. Referring to earlier differences, petitioner stated at the beginning of the trial (Tr. 49):

> Your Hnor [sic], last week, as a result of perhaps experiencing the most traumatic event of my life, I guess I didn't have it all together. I do have an attorney-client relationship at this time. Mr. Sutter and myself had a few friendly chats, brief chats via telephone from my home to Connecticit

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jointly tried for rape and robbery twice moved for separate counsel on the ground that they might present conflicting defenses; moreover, their appointed counsel had pointed out that each of his clients planned to take the stand, and that he would be unable, consistent with his obligation to all three, to cross-examine any one of them on behalf of the others. The questions thus presented by these circumstances have no bearing upon the markedly different circumstances of this case.

> [sic] over the long holiday weekend. I think I understand things a little better now.

Nevertheless, petitioner now claims (Pet. 12-15) that he did not receive effective assistance because counsel demeaned him throughout the trial. But the district court considered and correctly rejected this contention, noting that such comments formed a part of the trial strategy (Pet. App. 26a):

> I thought that two things were being done with respect to the defense of this case. One was to make sharp and clear the legal point first. And it was a two fold legal point. First, that the answers that [petitioner] gave were not solid answers before the Grand Jury and could not as a matter of law be the foundation of a perjury indictment. Second, that as a—the transcript shows he was distraught. He is a man of a certain quality of nervous disability which doesn't impair his usefulness as a worker or anything else, but peculiarly unfits him either to be a Grand Jury witness or a trial court defendant. And that appeared, to some extent, from the transcript of the Grand Jury proceedings and in all depths at the trial, at every occasion counsel pressed on the attention of the Court the man's mental frailty—not a disabling frailty, but one peculiarly unfitting him to stand the rigors of testifying in Court, testifying before the Grand Jury. So that by the time [petitioner] took the witness stand, I was supposed to take from his testimony what was good and discount to nervousness what was bad. That was a—the calculated part of this able lawyer's method of representing the defendant, that the seemingly derogatory remarks were attempted to [in]doctrinate me to believe—and I think that is reflected

in these memoranda—believe that he was not equal to these legal cases.[5]

c. The record as a whole supports the district court's finding (Pet. App. 27a) that petitioner's counsel represented him "very effectively." Counsel had "a rational trial plan" (Pet. App. 28a), conducted extensive cross-examination of the government's witnesses, developed a plausible theory of defense, and effectively summarized the evidence and his theory of the case during final argument. His decision not to call certain witnesses and his characterization of petitioner throughout trial represent tactical decisions that were well within the standard of reasonableness. Petitioner's belief, formed with the benefit of hindsight and new counsel, that his former counsel's strategy was unwise is not a sufficient basis for reversal of his conviction.

2. Petitioner also contends (Pet. 17-18) that his waiver of a jury trial, made in writing and in open court, was not intelligently made because of his physical and mental condition, and that the trial judge should have addressed him directly on the question of waiver.[6] It may be the better

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[5]Petitioner complains that many of these comments were made at side bar conferences. With respect to side bar conferences, the district court said (Pet. App. 25a):

> Now, I do realize that [petitioner] did not come up to the side bar. My own practice is never to exclude clients from side bars if they want to comeup. Ordinarily they come to the first one or two and not thereafter. They find them, as they usually are, rather dry discussions. There was no exclusion of [petitioner] from the side bar discussions in the remotest respect.

[6]Petitioner's additional contention that the report of the doctor who examined him pursuant to 18 U.S.C. 4244 should have been made part of the record is insubstantial. There is no requirement in the statute that such report must be included in the record. Moreover, petitioner did not request the report's inclusion in the record by the district court, did not

practice for a trial judge, "when advised by a defendant that he desires to waive his right to a jury trial, to interrogate the defendant so as to satisfy himself that the defendant is fully apprised of his rights and freely and voluntarily desires to relinquish them." *United States* v. *Hunt*, 413 F. 2d 983, 984 (C.A. 4). But petitioner's assertion that there is "no evidence in the record from which it could be ascertained on review that the waiver was voluntary" (Pet. 17) misses the point. Fed. R. Crim. P. 23(a) provides that a waiver of a jury trial must be "in writing with the approval of the court and the consent of the government," and these conditions were fulfilled in this case. "The record [thus] is silent only to the extent that it fails to contain any suggestion that * * * [his] waiver was anything but voluntarily and intelligently entered." *United States* v. *Mitchell*, 427 F. 2d 1280, 1281 (C.A. 3). Petitioner does not now argue and has never argued that his decision to waive a jury was coerced (see *Dranow* v. *United States*, 325 F. 2d 481, 483-485 (C.A. 8)) or that he failed to comprehend the gravity of his offense. *Riadon* v. *United States*, 274 F. 2d 304 (C.A. 6).

The record shows that on August 31, 1976, petitioner's counsel informed the court that he had spent an hour with petitioner advising him of his right to a trial by jury and that, after this consultation, petitioner had agreed that he should waive his right to a jury trial because his case basically involved questions of law, not fact (A. 19a-20a). On September 2, 1976, counsel and petitioner informed the court that petitioner still wanted to waive his right to a jury (A. 110a). On September 7, 1976,

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argue on appeal that the failure to include it deprived him of any right, and has at no time challenged the report's conclusion that he was competent to stand trial. Nor has he suggested that the report could support his argument that his waiver of jury trial was not knowingly and voluntarily executed.

petitioner's waiver of jury trial was presented to the court and accepted (A. 118a-119a). In these circumstances the district court properly accepted the formally executed waiver of trial by jury (see Pet. App. 27a-28a).[7]

3. Petitioner gave the following testimony before the grand jury, which was alleged in the indictment to have been willfully false (Pet. App. 7a-9a; A. 5a-8a):

> Q. * * *Now, did you play any role within your department in actively soliciting these contributions from employees under you at any time?
>
> A. * * *Each and every* * *year [after 1966], I was the transmitter.* * * I would never be so presumptuous in the community even if I knew a a man was—to say, "you ought to give five dollars or ten dollars." Neither would I be so presumptuous to say to anybody that, "You should give one percent."* * *
>
> * * * * *
>
> Q. A number of employees have testified that you would come around and give them a three-by-five or a similar card on which it would have

[7] *United States* v. *David*, 511 F. 2d 355 (C.A. D.C.), upon which petitioner relies, is not to the contrary. In *David*, the defendant had a substantial psychiatric history, had been found by a psychiatrist to be incompetent to stand trial, and had been evaluated by his counsel as possibly incompetent to waive his jury trial right. In these circumstances, the judge's mere inquiry of defendant whether he understood that he had a right to a jury and whether he relied upon his attorney's advice was held insufficient to establish that he made a knowing and intelligent waiver of jury trial. Here, in contrast, as the district court observed (Pet. App. 25a), petitioner had "command of his own mind" and "his own recollection." He was found to be competent to assist in the conduct of his trial, including the decision to dispense with a jury. Moreover, throughout the pretrial hearings he manifested his desire, consistent with his counsel's advice, to waive his right to a jury trial.

> their name, their salary, and a handwritten notation somewhere on the card which was a figure representing one percent of their salary. Now, first of all, has that occurred?
>
> A. No, not in the manner and the way that you said it.
>
> Q. All right. Would you relate your recollection?
>
> A. * * * I have previously stated that comes August or September and 95% to 98% of the department I am with, employees are in hinterland buildings scattered all over. I rarely see them. I have no direct communication with them. I have never solicited them. Okay? But as August and September come around, individuals and supervisors start calling up or coming in and believe it or not, sir, many of them * * * do not know their annual salary. If someone asks for their annual salary, they will get it.
>
> Q. All right. And then you write it down?
>
> A. If somebody will ask either in person or by phone, "Will you figure out one percent for me" * * * I will have one of the girls write it out for them.* * *
>
> Q. And then do you give it to them?
>
> A. I have given it to individuals and in some cases to their supervisors when they took the initiative and asked me for it.
>
> * * * * *
>
> Q. So from the standpoint of what you've just said, she [the secretary] would prepare the card for everyone in the department and then hold them so that they would be available if the individual requested it.

A. Yes. But somewhere along the way, we have received so many phone calls or so many requests, that I did give some to some supervisors with these instructions * * *. "* * *They are only to be given to a man if he asks you a question which specifically can be answered by you." And there was no one percent figure on those cards.

Petitioner contends (Pet. 18-19) that the foregoing responses were literally truthful (although perhaps nonresponsive) and thus not perjurious as a matter of law under *Bronston* v. *United States*, 409 U.S. 352. But *Bronston* was a quite different case. There the defendant appeared before the grand jury and, when asked if he had ever had a bank account in Swiss banks, testified "[t]he company had an account there for about six months, in Zurich." 409 U.S. at 354. The evidence at trial established that for nearly five years Bronston had a personal account in a Swiss bank. This Court reversed his conviction for perjury and found that Bronston's answer before the grand jury was literally true. Although there was an implication in the answer that Bronston had never had a personal account, this Court concluded that "literally true but unresponsive answer[s] are to be remedied through the 'questioner's acuity' and not by a federal perjury prosecution." 409 U.S. at 362.

Here, in contrast, petitioner plainly denied that he had solicited contributions and distributed unsolicited cards bearing the one percent figure—assertions wholly refuted by the evidence. Although his answers were rambling, they were neither unresponsive nor literally truthful. See *United States* v. *Bonacorsa*, 528 F. 2d 1218, 1221 (C.A. 2), certiorari denied, 426 U.S. 935. As the district court aptly observed (Pet. App. 23a):

> [T]he defendant's answers, while discursive and circumstantial, were precisely responsive. They depicted his role; they conveyed very complete answers to the questions asked. The answers he gave could not have been deprived of their content as responsive and untrue by any words that the defendant could have added to them short of total and explicit recantation before the Grand Jury of the substance of the answers given.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The

Supreme Court of the United States

October Term, 1976

No. 76-1510

RAYMOND W. GRABER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

ARGUMENT

1. The Solicitor General adopts the argument first urged by the United States Attorney before the Second Circuit that John Sutter's performance as petitioner's counsel was calculated as part of a trial strategy to benefit the petitioner and enhance the image of the petitioner as an unstable person particularly ill-suited to testify before a grand jury. The basic problem with this argument is that it is totally unsupported by any evidence in the record since the trial court refused petitioner's request for a hearing on his charges against his former attorney. The petitioner's grave misgivings about his attorney were made known to

the court at the time of his arrest,[1] which had in fact occurred because of a misrepresentation to the court by counsel. Judge Dooling and the United States Attorney, upon petitioner's arraignment on the indictment, were seriously concerned about the potential conflict of interest and Sutter thereafter wrote a letter to the judge conceding the potential possibility of a real conflict of interest. No one ever gave the petitioner a chance to explore the question of conflict of interest because his motion for a hearing was denied. The trial judge (who failed to reveal to petitioner the existence of Sutter's letter) simply decided on the basis of the post-trial motion papers, and without a hearing, that what counsel had done was a "tactic."

Thus, contrary to the Solicitor's General's statement (Brief in Opposition, 5), the claim was elaborated and pursued by petitioner and his post-trial replacement counsel to the extent permitted by the District Court . That court's refusal to hold a hearing is, in part, the basis for this application.

2. With respect to the Solicitor General's claim that petitioner has failed to suggest a concrete way in which the conflict prevented effective representation, it is submitted that the facts reveal a clear conflict which prevented counsel from representing petitioner vigorously. Counsel represented other public officials, and one highly placed Republican Party official, who, together with the County Republican Chairman and the Nassau County Republican Committee itself, were the principal targets of the grand jury investigation. Petitioner's attorney was provided and fully paid by a defense fund controlled by the Nassau County Republican Committee. On the face of the record his loyalty had at least to have been divided between his

1. Petitioner told Judge Dooling "On the day of my indictment the Republican Party provided counsel." (A46a). "I always have had this reservation of conflict of interests." (A51a). "Some of [my witnesses] wish to testify for me, but they are in great fear . . . they might lose their jobs if they testify for me." (A81a).

employer (who paid his fee and who was the real target of the investigation) and the client, in whose interests he was charged to act, but who was not paying his bill. Moreover, it is patent that petitioner's former counsel's representation of several defendants indicted by the same grand jury for crimes arising out of a conspiracy suggests the strong possibility of a conflict of interest. The interests of these defendants were inconsistent, in that prevailing public opinion, media pressure and political reality required that someone be convicted, and the only real question in the public mind was, at what level was the conspiracy hatched, and how high in the Republican hierarchy did it reach? This political reality made it impossible for a single counsel, compensated by the Republican organization, adequately and fairly to represent defendants at different levels of the alleged conspiracy.

3. Although counsel wrote to the court (Appendix 15a-16a) that he "was making arrangements" for separate counsel to represent petitioner and two other defendants, that was either a deliberate misstatement of fact or became such when counsel continued to represent all four charged defendants.[2]

2. The New York Code of Professional Responsibility (1970) provides, in part:

> "EC 5-14. Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client. This problem arises whenever a lawyer is asked to represent two or more clients who may have differing interests, whether such interests be conflicting, inconsistent, diverse, or otherwise discordant.
>
> EC 5-15. If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment. He

(Cont'd)

4. The fact that petitioner was indicted and convicted for perjury rather than conspiracy does not automatically eliminate the possibility of a conflict of interest on the part of trial counsel. The purpose of the grand jury inquiry was to ascertain who had participated in the so-called "1% scheme" whereby civil servants were allegedly required to contribute that percentage of their annual salary to the Republican Party; it was mainly the

(Cont'd)

should resolve all doubts against the propriety of the representation. . . .

EC 5-16. In those instances in which a lawyer is justified in representing two or more clients having differing interests, it is nevertheless essential that each client be given the opportunity to evaluate his need for representation free of any potential conflict and to obtain other counsel if he so desires. Thus before a lawyer may represent multiple clients, he should explain fully to each client the implications of the common representation and should accept or continue employment only if the clients consent. . . .

EC 5-21. The obligation of a lawyer to exercise professional judgment solely on behalf of his client requires that he disregard the desires of others that might impair his free judgment. The desires of a third person will seldom adversely affect a lawyer unless that person is in a position to exert strong economic, political, or social pressures upon the lawyer. These influences are often subtle, and a lawyer must be alert to their existence. A lawyer subject to outside pressures should make full disclosure of them to his client; and if he or his client believes that the effectiveness of his representation has been or will be impaired thereby, the lawyer should take proper steps to withdraw from representation of his client."

Counsel wrote to Judge Dooling on April 19th, 1976 that "It is patent that there is a real possibility that there is a conflict of interest" (A15a). The United States Attorney and the court both received the letter but petitioner never knew of its existence. Thus there was not only no full disclosure to petitioner of the potential conflict, but no disclosure at all. This clearly constituted a violation of the four code sections cited above.

purpose and focus of the grand jury inquiry to discover the source of the 1% policy, *i.e.*, who had given the orders to enforce these contributions. The Nassau County Republican Chairman was patently the focus of the inquiry and the government was clearly using perjury indictments as a weapon to compel subordinate public or party officials to inform on him. It was in the interests of the principal target of the investigation that it be made to appear that the subordinate officials solely, upon their own initiative, requested 1% political donations. Any attorney retained by the Republican organization was obliged to elect one of two competing strategies: either attempt to establish the Republican organization's version of the facts, or permit each client to testify as to his particular version of the facts. In this case, counsel was retained and compensated by the Republican Committee and not by individual defendants; he demeaned and degraded petitioner to the court, and petitioner complained about the quality of the representation as provided and the loyalty of his advocate. Thus the record clearly indicates that counsel resolved the conflict in this case in favor of his employer rather than his client and also indicates that counsel's representation was not a trial tactic that served petitioner's interests.

5. If it is assumed that counsel's representation arose out of a calculated strategy, the record is equally consistent with the existence of a scheme involving a well-cordinated effort by those persons who sought to protect themselves and their political party, and quell the public outcry for convictions by offering petitioner as a scapegoat. The successful execution of such a plan would have required that the defense of all those indicted be coordinated so as to ensure that the selected victim be convicted. Counsel would then have been employed by the party to represent all and implement this strategy of saving the party by sacrificing petitioner.

Such a tactic or strategy would have been utterly inconsistent with petitioner's interests. Adoption of the "tactic"

view, therefore, necessitated a hearing to ascertain the purpose and object of such tactic.

6. The report of the physician who examined petitioner under 18 U.S.C. §4244 — if it existed at all — was never placed in the record, and the Solicitor General seems to argue at footnote 6 that it was the petitioner's obligation to see to it that the report was placed in the record. Petitioner had no burden of placing any such report in the record. The record shows that the trial judge had substantial reason to believe that the petitioner was not competent to stand trial. There is nothing in the record to rebut that inference. It was the government's burden to rebut the inference raised by the judge in ordering the report in the first place. The lack of a report in the record cannot constitute proof that petitioner was competent to stand trial and waive a jury. Petitioner would have moved to challenge the contents of the report under Section 4244 but it was never made available to him and is still not spread upon the record.

7. The Solicitor General argues without basis in fact at page 6 that counsel conferred with petitioner for 15 hours to prepare him to testify. This comment of counsel was specifically denied under oath by the petitioner and his son in the post-trial motion (A439a, 457a-458a) and no evidentiary hearing was ever had on petitioner's claims that he met with counsel for a maximum of 45 minutes on a total of three separate occasions during the entire period from arraignment to trial (A423a).

8. Without serious thought or analysis, the Solicitor General adopts the view that whatever happened in this trial was part of a rational trial plan on the part of counsel. It is perhaps comforting to think that that was the case but petitioner has consistently denied it and, in fact, commenced complaining about the divided loyalty of his attorney before his trial ever began or the guilty verdict rendered — and he was never affored a hearing on the claim. The claim is more than colorable where the attorney's compensation is paid by an organization which is

the real target of his investigation and where the attorney's so-called tactic consisted of demeaning his client before the trier of the fact in a perjury prosecution. The demeaning and degrading comments were made out of petitioner's hearing and it is clear that the statements were not intended to be heard by the petitioner but only rather by the United States Attorney and the court. The record on its face indicates disloyalty on the part of the attorney toward his client[3] and there is no evidence whatsoever in the record that the petitioner ever adopted the attorney's so-called "strategy" as his own.[4]

9. Federal appellate judges have been complaining in recent years about the quality of representation in federal trial courts. That legitimate concern is not served by the Second Circuit's holding that, in effect, tolerates the most egregious misconduct, disloyalty and conflict of interest on the part of trial counsel, fully known to the trial court, and within its power to correct. Upon the wall of the author's law office hangs a print by Honoré Daumier, whose caption, translated from the French, reads, "Defense counsel has just paid tribute to the rare talent exhibited by the public prosecutor in his summation; the prosecutor pays merited hom[illegible]e to the admirable eloquence of defense counsel; the president of the court has applauded both orators. In brief, everyone is excessively satisfied — except the accused." This caption, we submit, aptly applies to the proceedings in this case.

---

3. Sutter stated that his client was "obviously trying to avoid the due processes of the law" (A21); that he "doubted the believability of those things" urged by his client (A84-85); and that his client's proposed testimony was "not going to be of any significance. I can assure you." (A328). See pp. 20-22, Petition for Certiorari.

4. Petitioner's strategy was to insist that the witnesses "be allowed to freely tell it like it was" (A453a) and that all necessary witnesses and documents be subpoened to prove that he was not guilty of a material misstatement (A461a).

10. The writ should be granted.

Respectfully submitted,

s/ Richard C. Cahn

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